United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

74-1510

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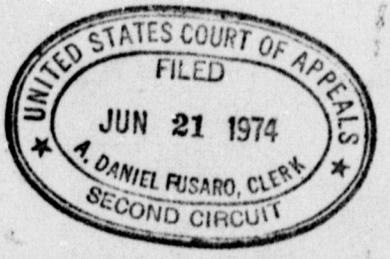
SECURITIES AND EXCHANGE COMMISSION Plaintiff -against- JAMES JOSEPH HAMMARTH Defendant	Case No. 74-1510 (T-3261) BRIEF FOR THE APPELLANT



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II. Statement of Issues Presented for Review

The first section has to do with procedural errors, mainly having to do with failure to give notice and to accord due process to the Corporate and thus the individual defendant.

The second section has to do with errors in substantive matters:

(1) Errors in interpretation of Sections AAA,BBB,CCC and JJJ of the SEC Act of 1934 as amended.

(2) Errors in interpretation of fact in defendant's resignation from Midland Equity.

(3) Error in finding of violation of rules 17 (a) and 17 a-4 of CFR.

(4) Errors in finding of fact.

Finally, there are errors in authorizing the injunction and errors in the scope of the injunction issued under Rule 65.

III. STATEMENT OF CASE

On 6 October 1972, I, James J. Hammarth, then President of Midland Equity Corp., (appearing Pro Se in this case) received a letter dated 3 October 1972 from the Securities Investor Protection Corp. (SIPC) (see Reference 1 attached), warning that if Midland Equity Corp. failed to pay its assessment in five days, it would be unlawful for Midland Equity Corp. to continue in business as a broker dealer.

I noted that Congress had provided each dealer with the option of belonging to SIPC or leaving the business with no penalty beyond foregoing the opportunity to conduct a securities business. (See Section 78 jjj of Securities Investor Protection Act of 1970 attached).

After consultation with Counsel and shareholder and analysis of the burdens of SIPC, we reached a decision to accept the penalties of Public Law 91-598 - December 30, 1970 (Section 10) and leave the securities business.

Since accountability to the Commission flowing from registration under Rule 15b1 (17 CFR 240 Rule 15b1) was a concomitant of the privilege of engaging in the securities business in interstate commerce we assumed that accountability terminated with the termination of the privilege of doing business.

On 26 October 1972 two gentlemen from the SEC, a Mr. Appoldt and Mr. Green came by Midland's office, rather upset at having found me on the floor below my former habitat, a move necessitated by the departure of my former landlord who had been having problems with the building's owner.

They wanted to see the books of Midland Equity Corp. I explained to them Midland's position under Public Law 91-598 Dec. 30 1970, and that it would appear that Midland was no longer a jubject of SEC jurisdiction. They then tried to pursuade me that I must sign a form BDW (reference attached) and subject Midland Equity and myself to criminal penalties for some years to come if I departed from some standard of behavior devised by the SEC and subject obviously to its well known whim. I declined the honor.

Mr. Appoldt departed, never again addressing the subject of what I thought was a reasonable interposition of objection to visitation, pausing briefly only to call me and assure me of the desirability of subjecting myself voluntarily to criminal penalties.

Sometime in early February 1973 I received a letter from the SEC signed William D. Moran by Thomas Beirne dictated by MTG directing me to cooperate with the Commission or something bad was going to happen to me, but not otherwise to be confused with legal process. (See letter Reference attached). I made a mental note of it but was impressed by it in much the same fashion as I would be by a bill collectors note, something with which I had a great deal more experience.

At this time the lease of my new landlord, Frances Murphy drew to a close, as I knew it would on 31 January 1973. Faced with a principle stockholder grown restive and no real reason for maintaining facilities in lower Manhattan, since I had no place for storage, I negotiated the sale of the trappings of Midland Equity Corp. lock, stock and barrel to a casual acquaintance, Joseph P. Goggins, on behalf of Midland's principle

stockholder, and resigned my office in the Corporation.

On 13 June 1973 Judge Gagliardi signed a Show Cause Order and Temproary Restraining Order on representations by the Commission that immediate and irreparable injury, loss and damage to the public would result without it.

We now know these representations to have been specious.

Mr. Hammarth appeared before Judge Gagliardi on 21 June 1973. His affadavit of appearance and protestations of Cause were treated with such great regard that they do not appear in the file kept by the court. Mr. Hammarth discovered the oversight by comparison with his own files.

21 June 1973: Judge Gagliardi conducts the trial on motion for a preliminary injunction by the Commission. Mr. Hammarth appears pro se and informs the Court that Midland Equity Corp. is not appearing. (Record of Trial, page 2). Mr. Gregg states that Mr. Hammarth is (apparently constructively) a registered broker-dealer and will remain one until such time as he is permitted to withdraw by the Securities and Exchange Commission.

The Court requests that the Commission submit a memorandum of law and proposed findings by July 2, 1973.

4 Dec. 1973: Judge Gagliardi signs a memorandum decision finding for the plaintiff.

27 December 1973: Defendant motions for new trial and amendment of findings.

Denied February 28, 1974.

21 January 1974: Defendant motions for amendment of findings.

Denied 28 February 1974.

25 February 1974: Defendant motions for Relief from Preliminary injunction.

Not yet acted upon 18 May 1974.

16 April 1974 : Defendant files notice of appeal and appeal procedure begins.

Procedural Errors

1. No evidence that Midland Equity Corp. has been served with process in this case. (See Record of Trial, Doc. 10).

2. No appearance by Attorney for Midland Equity Corp.

Mr. Hammarth indicated at the trial 21 June 1973 that he was appearing pro se (Record of Trial, Doc. 10, lines 1-14).

No construction of the law would permit Mr. Hammarth to be representing the entity Midland Equity Corp. Mr. Hammarth is not at attorney and is therefore not qualified to practice before any court. (See Ref. 17 attached, 7 AM JUR 2nd, Par 6.)

Further, no person has the right to appear as another's attorney without the others authority, whether the other is a natural person or a Corporation. (See Ref. 18 attached, 7 AM JUR 2nd, par 112).

3. Trial proceded as though Midland Equity was represented. (See Record of Trial, Doc. 10).

4. Judgement was entered as though the Corporate defendant was present. (See Rec. of Trial,Doc.10 , Mem. Dec., Doc. 13, Order, Doc. 19).

This action violated the Constitutional rights of the defendant Midland to notice and to a fair trial as required by the 14th Amendment.

Requirement that parties be notified of proceedings affecting their legally protected rights is a vital corollary to one of the most fundamental requesites of due process, the right to be heard. Shroeder V. City of New York NY 1962, 83 S Ct. 279, 371 U.S. 208, 92 Ed. 2nd 255, 29 ALR 2nd 1398.

(See Ref. 21 attached, P. 587, Amend. 14, Note 85.)

"Corporations are persons within the meaning of this amendment, forbidding deprivation of property without due process of law....." (See Note 357, Amend. 14, Reference 22 attached.).

Right to a fair trial. (See Note 634, Amend. 14, Reference 23 attached).

5. No effort was made to demonstrate the validity of process before the Court nor was motion made for judgement by default. (See Record of Trial, Doc. 10).

6. The procedural irregularities prejudicing the right of Midland Equity Corp. to notice and a fair trial prejudiced the right of the defendant Hammarth to a fair trial because it was this assumption that Midland and Hammarth were the same person that made this trial possible in this form by conveniencing the position of the SEC. (See Record, Doc. 10 attached).

7. If any difficulty was experienced in serving Midland, certainly the Secretary of State, who is authorized for service of process for all New York Corporations could have been properly served quite conveniently.

8. The defendant Hammarth received a letter dated 3 May 1974 from the SEC signed William D. Moran, By Thomas R. Beirne, Chief Attorney Branch 3. (See Reference 19 attached). This letter was apparently prepared in concert with Prefessor Nathaniel Fensterstock, Staff Counsel United States Court of Appeals, 2nd Circuit.

The letter states that Prefessor Fensterstock has scheduled a pre-appeal conference for Tuesday May 14, 1974 at 4:30 P.M. in Room 1804.

The hearing was characterized by:

(a) No notice from the Court. (See SEC letter, reference 19)

(b) No information from Court as to possible content of hearing.

(c) No procedures to maintain a record of the proceedings.

(d) A lack of preparation on the part of Professor Fensterstock.

(e) A pronounced bias on the part of Prefessor Fensterstock for an immediate settlement on the SEC's terms.

(f) An intimation that a refusal to take part would prejudice the right to appeal.

This hearing was apparently scheduled in violation of Rule 33, FRAP (see Reference 20 attached) which prescribes that such hearing is to be before the court or a judge thereof.

The meeting before Professor Fensterstock was held in the worst police station style.

Professor Fensterstock undertook to inform the defendant that he was here to settle this case and that was precisely what he was going to do.

When the defendant protested that he, because of the nature of the notice, was not prepared for this kind of proceeding either by way of the necessary materials or study of the situation Fensterstock blustered onward.

He read in detail the lower Court's Judgement and then had the attorney for the SEC recite the penalties for contempt. (Further conversations brought out that that was all he had read). He then demanded of the defendant that he comply with Judge Gagliardi's order, and further

stated that you were ruled against in Judge Gagliardi's Court and you will be ruled against here.

The defendant protested, but Fensterstock blustered on. The defendant informed him of the nature of his testimony in the lower Court, and Fensterstock tried to get him to change it. He then became aware of the defendant's pro se position and called the Pro Se Clerk to ask him if the defendant was entitled to Counsel.

The Clerk asked if I was impecunious.

I asked what it meant.

He asked if I was employed.

I answered yes.

He asked if I was qualified for legal aid. I said no.

He said I was not entitled to free counsel.

I explained to him my position at the moment, being unprepared by way of inadequate notice, and whether refusal to participate in these proceedings would prejudice my right to appeal.

He said no.

I hung up.

Fensterstock made a self serving statement about me now being advised of my rights and that we would proceed. I informed Mr. Fensterstock that I would say nothing further.

It is my impression that this hearing was held in violation of Rule 33, FRAP, that it was conducted in the worst police station fashion, that the defendant Hammarth was not informed of his rights and that the SEC and

Professor Fensterstock acted in concert to deprive Mr. Hammarth of his right to a fair hearing upon appeal. Further, the hearing was held in the privacy of Mr. Fensterstock's office, with the only other person present the attorney for the Plaintiff, putting the defendant in an untenable position, if as was represented, this was a compulsory hearing.

In any case I think Fensterstock is as mad as a hatter and a real danger both to litigants and the integrity of the Court.

The man started this hearing at 4:30 in the afternoon expecting we presume to be finished by dinnertime, (1) having given no notice to the defendant, (2) no information as to the possible content of the hearing, (3) had not acquainted himself with the issues, had not in fact read any of the material in the case and (4) was unable to interpret the significance of certification of a missing document.

Error in Finding that Procedures for Withdrawl in Rule 15b (6) of the Securities & Exchange Act of 1934 (15 USC p. 78o (b)(6) are Controlling in this Case

The Courts finding: page 3, paragraph 1 of Memorandum Decision (Doc. 13) "The procedures pursuant to which a registered broker-dealer may withdraw are explicitly set forth in Section 15 (b)(6) of the Securities Exchange Act of 1934 (15 U.S.C. -780 (b)(6). In order to terminate registration a broker-dealer is required to file a formal notice of withdrawal with the Commission: the form of such notice and the manner in which it must be filed are described in Rule 15b6-1 (Ref. 10) (17 C.F.R. 240.15b6-1). Admittedly, Hammarth has never filed the required withdrawal form with the Commission. When S.E.C. compliance examiner Appoldt offered to supply Hammarth with copies of the appropriate withdrawal forms Hammarth refused. Current Commission records indicate Midland's continued status as a registered broker-dealer. In the face of these uncontested facts, Hammarth relies upon the theory that Midland's failure to pay its 1972 S.I.P.C. assessment in some manner effectuated a withdrawal of its registration as a broker-dealer. Essentially, Hammarth is arguing that Midland's failure to comply with the provisions of the Securities Investor Protection Act placed it beyond the reach of the S.E.C.'s power of inspection. This argument is clearly without merit", is in error because Public Law 91-598 Dec. 1970 has since become Chapter 2-B-1 of the Exchange Act, paragraph 78 bbb, which says ""Except as otherwise provided in this chapter, the provisions of the Securities Exchange Act of 1934 (hereinafter referred to as the "1934 Act") apply as if this chapter constituted an amendment to, and was included as a section of, such Act."

Further, paragraph 78 ccc (a)2 states that..." the members of which shall be -

(A) all persons registered as brokers or dealers under Section 78o (b) of this title, and

(B) all persons who are members of a nationalsecurities exchange."....

Section ccc (a) 1 further states that SIPC shall not be an agency or establishment of the United States Government.

It is then in theory a voluntary organization (such as FDIC) but it is also a condition of registration superseding the requirements of Section 15B the 1934 Act, as is indicated in paragraph 78 bbb "Provisions of the 1934 Act apply as if this chapter constituted an amendment to and was included as a section of such Act."

In order to maintain the voluntary status of this Act the penalty provisions provide the alternative of being prohibited to engage in the securities business as penalty for non compliance. (See 15 USC, 78 JJJ, Ref. 5)

Since these provisions are legal sanctions there is no element of voluntariness in them and no provision for withdrawal applications. Cite attached reference 15, SEC Act 1934, Ch. 2B1 - par. jjj.

Inspection and visitation provileges beyond the time of termination of business rely on voluntary compliance such as evidenced in form BDW. Section 15b 6-1 (See attached reference 10) applies to voluntary withdrawal from business. The section has no application to involuntary termination of business.

There is no provision of Section 15 providing for Form BDW in the instance of involuntary termination of business. See Section 15b6-1.

Error in Interpretation of Effect of Resignation

"His current attempt to frustrate the SEC's investigation by apparently divesting himself of control of Midland and placing its books and records in the hands of some unreachable third party does not relieve him of his responsibilities under the inspection provisions of the Act".

(1) Divesting himself of control. Mr. Hammarth was never invested with control. He managed the corporation in the role of Corporate employee, (See Record of Trial, page 8, lines 19-22 -- Document 10).

(2) Placing its books and records in the hands of some unreachable third party.

(a) There is no evidence in the record of trial to indicate that Midland was even served with process in this proceeding. (See Record of Trial, Document 10).

(b) Neither the court or the SEC seemed interested in establishing the existence of Goggins or the Corporation, since no one asked where they were located or where they might be found.

(c) The only conclusion we can draw is that they erroneously sought to establish my identity and the Corporate identity as one for convenience in prosecution.

(3) The Court misinterpreted Hammarth's statements.

Mr. Hammarth indicated:

(a) He had resigned as officer and director of the Corporation. (Paragraphs 20 and 21).

See Affadavit of appearance dated 21 June 1973 which was not included in the record of trial, but which the Court had in its possession, reference 8 attached.

See Record of Trial, page 5, Document 10. Mr. Hammarth.....

"If you would like, I will read it all".

Court: There is no need to read it aloud. I have it here.

See Record of Trial, Page 2, line 2.

"Mr. Hammarth, are you or are you not a member of the Corporation, stockholder or officer?"

Mr. Hammarth: I am not sir.

Mr. Hammarth was indicating that:

(a) He was no longer an officer of the Corporation and thus unavailable for service of process on the Corporation.

(b) That he no longer had control of or access to the books and records of the Corporation.

(c) That he was not responsible for any activity or omission on the part of the Corporation after 15 February 1973.

(d) That responsibility under Rule 17(a) terminated with termination of employment 15 February 1973. (Ref.10,17 CFR 240 15b6-1)

(e) That jurisdicition of the SEC over the person of Mr. Hammarth terminated 15 February 1973.

SEC jurisdiction is established by the filing and acceptance of Form BD (See 17 CFR 240.15b1-1, reference 9 in the case of a broker-dealer, and it is maintained over employees as a condition of their employment.

Rule 15b6-1, Reference 10 is attached for inspection. It contains no rules as to the withdrawl of employees upon termination of employment, imposes no conditions on their leaving employment.

Mr. Hammarth is not now and has never been a registered broker-dealer. (See Form BD, SEC File Plaintiffs Exhibit 1) and as a consequence was not personally burdened with execution of form BDW. (See 17 CFR 240 15b6-1, reference 10 attached).

Error in Findings of Violations of Rule 17 a , USC 15 78 (Q) a

The essence of this action is which or whether a violation of Section 17 (a) of the Securities and Exchange Act of 1934 took place. (See Ref. 5 att)

The act reads in part, "....such accounts, correspondence, memoranda, papers, books and other records shall be subject at any time or from time to time to such reasonable periodic, special or other examinations....."

It is the defendandt's contention that the Court found in error when it found violations arising out of the visit of Appoldt and Green to Midland Equity on 25 October 1972.

It bases this conclusion on the fact that the question of whether or not the penalties of SIPC, Section 78 jjj are controlling in this situation. Reference 15 below is a real one, and certainly a reasonable one.

The further fact that Appoldt never again addressed the question and Gregg was careful not to enunciate an official opinion and the "investigation" dragged on interminably, tends to support this line of reasoning.

Since Hammarth had called the Commission to raise the question and no further opinion was offered, he concluded that no one at the Commission was terribly interested in litigating the question.

Again, this tends to underline reasonableness and we can cite 15 USC 78o, note 24,, the only way to find out what is reasonable is to challenge the law.

Since the Commission has been vested with overwhelming powers and no provision has been made for arbitration or clarification in this structure, we maintain that a reasonable interposition of objection is not a violation and that the Court erred in finding it to be one.

"First, Hammarth contends that as a result of its failure to pay its 1972 SIPC assessment Midland is no longer a broker-dealer and is not subject to the inspection provision". (See Memorandum Decision, page 2).

This interpretation is erroneous. Mr. Hammarth contends that under the provisions of Section 78 jjj of the Securities Investor Protection Act of 1970, which according to paragraph bbb are to be applied as an amendment to the Securities and Exchange Act of 1934, Midland Equity Corporation was prohibited from engaging in the securities business as of 12 October 1972. (See Reference 1, SIPC letter).

And, that under the provisions of this section there is no obligation to execute Form EDW. (See paragraph 78 jjj, reference 15 attached).

Error in Finding of Violations of 17-a-4

The Memorandum Decision dated 4 December 1973 cites rule 17-a (lines 2 and 3) Memorandum Decision as "provides that such records shall be maintained for a period of six years and that in the event a registered broker-dealer ceases to be registered he shall maintain such records intact for the remainder of the time period specified in the rule".

There are no allegations of violation of this rule spelled out in either the complaint or the Memorandum Decision.

There has been no argument that the books have not been maintained or preserved or are not intact.

There has been no argument that the books are not in an easily accessable place.

The complaint cites "refusal to permit inspection". See page 2, paragraph 10, Complaint entered 12 June 1973.

There can be no allegation of violation of this section especially in consequence of the fact that there is no evidence of any attempt to contact Midland Equity Corp. (See Record of Trial, Document 10)

The Commission is fundamentally in agreement. "The scope of this injunction that we are requesting is basically geared toward Section 17 (a) of the 1934 Act, and specifically to the injunction and visitation provisions". (See Record of Trial, page 4, lines 12-14, Document 10)

Error in Characterizing SEC Letter of 31 January 1973 as Basis for Violation

1. The purpose of the letter dated 31 January 1973 was to renew the SEC's demand for access. See letter, reference 16 attached.

(a) It does not reference what demand.

(b) It apparently refers to the Green and Appoldt visit of 26 October, 1972, since this was the only request made.

(c) The basis for the Commission's demand appears questionable as discussed in error # 1 above.

(d) If it renews the demand of Green and Appoldt it continues to be unreasonable because it does not direct itself to the objections of the plaintiff. See Error (b) above.

(e) It does not suggest a course of action.

1. It gives no time for compliance.
2. It gives no place for compliance.
3. It makes no limit on the time for compliance.
4. It is couched in a bill collectors jargon, offering vague threats of serious consequences, the meanwhile suggesting a poor case which is the defendant's contention.

Error in Finding Michael T. Greggs Phone Call of 17 May 1973 as Basis For Violation

According to Mr. Greggs own testimony, (Record of Trial, page 26, lines 15-19) : Doc 10

> "I also called his number listed at his former address, and on the second call, I discovered on both calls that he had moved - but the second time I called I was informed of his new address. And at that time I didn't attempt to contact him at his new address because the TRO had already been signed".

Error in Finding of Facts

The Court states "Hammarth's contention that the purported sale to Goggins insulates him from the inspection provisions of the Act is not persuasive." It then proceeds to ground its logic in a misinterpretation of the proceedings.

Error of Fact # 1

On page 2, paragraph 2 Hammarth contends that as a result of a sale of his Midland shares to one Joseph P. Goggins, he is not individually subject to the inspection provisions.

This statement is in error. Hammarth has never owned any of the shares of Midland Equity Corp. This fact is verified by the Commissions records: (Record of Trial,line 19-20-21, page

Mr. Gregg: As a second matter, Mr. Hammarth never held any stock; his wife owned stock.

Error of Fact # 2

This error is carred over to page 3, paragraph 3 (Document 13) "Approximately four months after the Commission's initial request to examine Midland's records, he sold his interest to one Joseph P. Goggins".

Mr. Hammarth once again never stated that he conveyed his interest since he had no interest in the shares. (Record of Trial, lines 19-20-21).

Error of Fact # 3

"Hammarth was unable to tell the Court whether or not Goggins was in control of Midland".

No individual not having control of the Corporation or access to its

private records could know whether Goggins was in control of Midland.

Error of Fact # 4

"Moreover, Hammarth indicated that he was not willing to assist the Commission in locating Goggins and through him the books and records."

Hammarth had no responsibility to the Commission to loacte Midland or Goggins or the books and records. He was indicating his general dissatisfaction with the Commission and its operations as well as his irratation at the particular conduct of the Commission's representatives in this proceeding.

In the heat of battle, particularly given the personal identification with issues in a Pro Se proceeding, it is error to base a conclusion of evasiveness on this refusal.

Error of Fact # 5

"Hammarth's attitude in response to questions concerning the purported sale can only be described as evasive and casts substantial doubt upon the bona fides of the sale".

What the Court here describes as an attitude was an erroreous misinterpretation of what was in reality a thoughtful factual response to the mechanical process of the transfer of securities gleaned by the defendant from his day to day activities in the business of buying, selling, delivering and registering securities for both his account and for others, as illustrated below. (See Record of Trial, page 7, lines 8-25, and page 8, lines 1-5).

The Court: To whom was stock of the Corporation transferred?

Mr. Hammarth: Well, I didn't come prepared to....

The Court: Do you know?

Mr. Hammarth: I have no way of knowing who the stock was ultimately transferred to, because I lost control of the books when I sold it."

This is the only factual answer that could be given by anyone not having access to or control of the Corporate documents.

The Court: You must have know who you sold it to and who you gave the books to in February.

Mr. Hammarth: You asked me a different question. You asked me who the stock was transferred to.

The Court: All right, whom did you <u>transfer</u> the possession of the books to and so forth?

Mr. Hammarth: I <u>delivered</u> the books.

Note: <u>Transfer</u> is a legal process in which the securities are registered in some name, actual nominee or street name by either a trust company or the Company itself, at the direction of the responsible officers in control of the Corporation.

The Court: Yes?

Mr. Hammarth: Yes.

The Court: To whom?

Mr. Hammarth: To Joseph P. Goggins.

End of comments regarding sale of securities and delivery of books.

Mr. Hammarth replied to the questions of transfer as accurately as was possible given a knowledge of these processes.

Most attorneys and laymen are better acquainted with the traditional concepts of the transfer of property which are found in real estate and in the transfer of personal property such as automobiles, where the ritual of transfer is extremely precise and involves no secrecy.

The rules of securities transfer as they have evolved in what is loosely known as "the street" or financial community are quite different.

Whether in an agency or principal transaction, the name of the actual purchaser or seller is most often unknown, to the party making the purchase or sale. Further, the security delivered is often in nominee name, or street name and even when in the name of an individual, it is most often not the individual who has been a party to the transaction. It is usually an individual who has signed the security, and for whom it has been guaranteed. In this fashion it may float around the street interminably in bearer form until it is finally put through legal transfer by the company or its agent, the transfer agent, most often a trust company.

This was the process Hammarth was referring to.

The Courts Finding of Sufficient Cause was Made In Error, and is Not Consonant With Courts Actions.

1. The Temporary Restraining Order granted without notice in this case expired according to the provisions of Rule 65B (FRCP) (See reference 7 attached), within a period not to exceed 10 days unless the time fixed for the order for good cause shown is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. See Sims V. Greene CCA Pa., 1947 160 F2nd 512, reference 24 attached. See also Pan Am v. Flt Eng. Int. Ass. NY 1962 306F 2nd 840, reference 25 attached.

2. The Court reserved judgement in this case for a period commencing approximately 21 June 1973 until 3 December.1973.

3. The Court's action in reserving judgement for this period of time leaving the interests of the plaintiff unprotected, sheds substantial doubt on the Court's perception of sufficient cause.

4. This raises the question of punishment for past acts. An injunction may not be imposed on a defendant to punish for past conduct or employed merely as a basis for jurisdiction which otherwise would not exist. See Woods v. Wolf, CA Pa. 1950 182 F 2nd 516, reference 26 attached.

5. The Court's perception of sufficient cause, or more especially its lack of that perception of cause makes untenable its finding of a proper showing of need.

Injunction Under Rule 65 Federal Rules Civil Procedure Given in Error

(See Reference 7, Rule 65 Fed. Rules Civ.Pro.)

(1) The factual situation at the time of the signing of the order was such that no right to injunctive relief as regards defendant Hammarth was present, for the following reasons:

(a) The Commission had not introduced any evidence to show that Hammarth was employed by Midland Equity at the time of trial, much less at the time of the signing of the order.

(b) The Commission had not introduced any evidence to indicate that Hammarth as a former employee has a responsibility for the firms books and records at the time of trial.

Rule 17 a-4 (17 CFR 240.17a-4) "Records to be preserved by certain Exchange Members, Brokers, and Dealers", refers in both Section (a) and Section (g) to persons subject to Rule 17 a-3, "Records to be Made by Certain Exchange Members, Brokers and Dealers". There is no evidence that Mr. Hammarth be burdened as a broker dealer (see Form BD attached, Reference). He has merely been designated as an officer (see Form BD, Schedule A attached, Reference , and see also Plaintiff's Exhibit 1, Record of Trial). Therefore, there is insufficient evidence to support a contention that he has violated Rule 17 a-4 (17 CFR 240. 17 a-4), since he never had a burden under that rule that did not arise out of his relationship with Midland Equity Corp.

(c) The Commission had not introduced any evidence that Hammarth as an employed individual was subject to any withdrawl provisions in leaving employment from a registered firm.

(d) The Commission failed to establish current jurisdiction over Hammarth as a former employee of a registered firm. Just as the ability to perform as salesman or supervisor ceases with termination of employment, SEC jurisdiction ceases absent employment. (See 15b1 - Registration of Brokers and Dealers, Rules and Regulations, Securities and Exchange Act 1934). The Commission's jurisdiction over Mr. Hammarth as regards Rule 17 a-4 (17 CFR 240.17 a-4) is dependent on a continuing relationship with Midland Equity Corp. There is insufficient evidence to support the contention that the SEC continues to have jurisdiction for purposes of this suit absent Mr. Hammarth's relationship as an employee of Midland Equity Corp.

(e) On page 4, Memorandum Decision, paragraph 1, the Court finds: "H is current attempt to frustrate the SEC's investigation by apparently divesting himself of control and placing its books and records in the hands of some unreachable third party does not relieve him of his responsibilities under the inspection provisions of the Act".

There is no evidence to support the contention that Hammarth divested himself of anything since in fact he had no relationship to the Corporation other than as employee. (See Record of Trial, page 7, lines 8,9,10,11). Further, there is no evidence in support of any allegation of responsibility under Rule 17 a-3, past the date of 15 February 1973.

(f) There is no evidence to support the conclusion implicit in the Memorandum Decision that Hammarth had any responsibility to amend Form BD after 15 February 1973. It is upon this premise that the SEC rests its case for continuing jurisdiction and for alleged violation of Rule 17 a-4 (17 CFR 240.17 a-4). (See also Record of Trial, page 4, lines 5,6,7,8,9,10).

2. The right to relief by injunction depends upon the factual situation as of time of decree rather than as of filing of Bill. See Lattavo Bros. v. Huddock, D.C. Pa. 1953, 119 F. Supp. 587, affirmed 74 S. Ct. 478, 347 U.S. 910, 98 L. Ed. 1067. "The right to relief by injunction depends upon the factual situation as of time of decree rather than as of the filing of the bill".

3. There were apparently no wrongs anticipated by the Court since the Court left the interests of the plaintiff unprotected from the time of trial, 21 June 1973 to the time of the filing of decree on 24 January 1974, a period of seven months. See Congress of Racial Equality v. Douglas, C.A. Miss. 1963, 318 F. 2nd 95, certiorari denied 84 S. Ct. 73, 375 U.S. 829, 11 L.Ed. 2d 61., "The Court may not enjoin conduct which is neither threatened or imminent". Also, see Bowles v. Weiss, D.C. pa. 1946, 66F. Supp. 366. "A writ of injunction can never be used to punish for past offenses, but it should be used only to stop existing or threatened violations."

4. Since the defendant has neither possession nor control of the books in question, compliance with the injunction becomes impossible. See Penn. Central C. v. Buckley & Co., D.C. N.J. 1968, 293 F. Supp. 653, affirmed 415 F. 2nd 762. "Court of Equity will not grant injunctive relief unless it is shown that, if granted, court may enforce mandate".

5. Since the order of this court is impossible of compliance it appears that this injunction is being imposed to punish for past conduct and as a basis for jurisdiction. See Woods v. Wolfe, C.A. Pa. 1950, 182 f.2d 516. "An injunction may not be imposed on a defendant to punish for his past conduct, or be employed merely as a basis for jurisdiction which otherwise would not exist."

Error in Authorizing Injunction

The order signed by Judge Gagliardi (Document 19), January 26, 1974 reads in part "...or any other registered broker dealer of which James Joseph Hammarth may become a principal or controlling person".

Section 78U (e) of the 1934 Act (Reference 4) reads, "Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices....it may....bring an action to enjoin such acts....." Section 78q is interpreted (generally) to create no substantive liability. See P 156, Ch 2B, SEC Act of 1934. Note: Rippey v. Denver U.S. Nat. Bank, DC Colorado 1966, 260 F. Supp, 704.

Mr. Hammarth might (assuming no other error in this case) be enjoined from preventing SEC visitations in the case of Midland Equity.

However, since this is an act and no evidence has been shown to indicate that it might be a practice, it is difficult to conceive of the reasoning that would broaden the injunction to "or any other broker dealer of which James J. Hammarth etc.". This is especially ture, when one considers that this broadening is in the nature of a punishment that could prevent Mr. Hammarth from achieving a position of responsibility with another firm, because:

(1) paragraph 78 (g) provides for no substantive liability.

(2) There were apparently no wrongs anticipated by the Court since the court left the interests of the plaintiff unprotected from the time of trial, 21 June 1973 to the time of the filing of decree on 24 January 1974, a period of seven months. See Congress of Racial Equality v. Douglas,

C.A. Miss. 1963, 318 F. 2nd 95, certiorari denied 84 S. Ct. 73, 375 U.S. 829, 11 L. Ed. 2d 61., "The Court may not enjoin conduct which is neither threatened nor imminent". Also, see Bowles V. Weiss, D.C. Pa. 1946, 66 F. Supp. 366. " A writ of injunction can never be used to punish for past offenses, but it should be used only to stop existing or threatened violations.

(3) 78 U (e) reads, "whenever it shall appear....that any person is engaged or about to engage in any acts or practices..." It is difficult to see how this doctrine could be projected to generations of Corporations yet unborn as in corruption of the blood.

(4) It subjects any other person with whom Mr. Hammarth associates in the securities business to the provisions of an injunction in whose issuance they had no part and of whose existence they may have no knowledge. For example, the out of town officers of a wire house, such as E.F. Hutton, who would under most circumstances not have access to personnel records. We content that his clause of the injunction is unconstitutional because it would tend to prejudice the rights of others without due process of the law.

(5) Courts may not enjoin conduct which is neither threatened or imminent. See Congress of Racial Equality v. Douglas, C.A. Miss. 1963, 318 F 2nd 95. Certiorari denied 84 S Ct. 73, 375 U.S. 829,11 L. Ed. 2d 61. See p. 429, Rule 65 FRCP, reference 7 attached.

V. Conclusion

On the basis that there is:

1. Prejudicial error in procedure.
2. Error in interpretation of applicable law.
3. Error in allegations of violation.
4. Error in findings of fact.
5. Error in conclusions of law.
6. Error in authorization of injunction.
7. Error in scope of the injunction issued.,

The defendant requests that the preliminary restraining order be dissolved and the case against him be dismissed.

77- [illegible] (2-9761)
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

SECURITIES AND EXCHANGE COMMISSION

Plaintiff,

vs.

JAMES JOSEPH HAMMARTH

Defendant.

APPEAL BRIEF

James J. Hammarth
21 Davenport Avenue
New Rochelle, New York 10805
Tel. (914) 636-8487

Docket Nov. 29, 1976

74-1510

B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SECURITIES AND EXCHANGE COMMISSION

Plaintiff

-against-

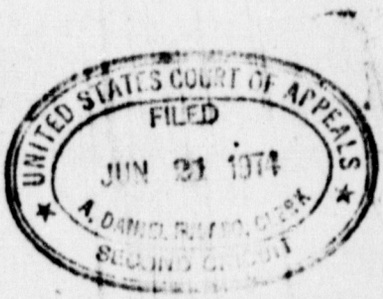
JAMES JOSEPH HAMMARTH

Defendant

Case No. 74-1510
(T-3261)

PAMPHLET OF STATUTES REFERENCED IN BRIEF

No target



2

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

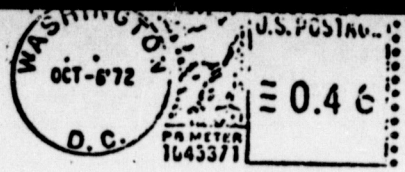
SECURITIES AND EXCHANGE COMMISSION Plaintiff -against- JAMES JOSEPH HAMMARTH Defendant	Case No. 74-1510 (T-3261) PAMPHLET OF STATUTES REFERENCED IN BRIEF

INDEX TO REFERENCES

1. SIPC Letter 3 October 1972
2. CFR 240.17 a-4
3. Title 15USC 78BBB "Securities Investor Protection Act of 1970"
4. 78(u)e SEC Act of 1934
5. 15 USC 78 (q)a SEC Act of 1934
6. Rule 33, Federal Rules Appelate Procedure
7. Rule 65, Federal Rules Civil Procedure
8. Affidavit of appearance
9. 17 CFR 240.15-b-1-1
10. 17 CFR 240. 15-b-6-1
11. 17 CFR 240. 17a
12. Public Law 91-598 December 30, 1970
13. Section 78u, Note 24, Remedies of Dealer
14. 15 USC 78 ccc (See Reference 3 above)

15. 15 USC 78 jjj
16. SEC letter dated 31 January 1973
17. 7 AM JUR 2nd # 6 "Necessity that litigant appear by counsel"
18. 7 AM JUR 2nd #112 "Express or implied authority necessary"
19. Fensterstock letter (SEC letter dated 3 May 1974)
20. Rule 33, Federal Rules Appellate Procedure
21. U.S. Constitution, 14 Amendment, see Note 805, "Right to notice", page 587 attached
22. U.S. Constitution, 14 Amendment, Due Process, Note 357
23. U.S. Constitution, 14 Amendment, Due Process, Note 634
24. Rule 65, Federal Rules Civil Procedure, Note 245, Page 485
25. Pan Am v. Flt. Engineers Assoc., Page 526, FRCP, Rule 65, Note 332
26. Woods v. Wolfe, C.A.Pa 1950, 182 F.2d 516

ESTOR PROTECTION CORPORATION
SUITE 2150
L'ENFANT PLAZA, S. W.
HINGTON, D. C. 20024



CERTIFIED
No. 717123
MAIL

SIPC

SECURITIES INVESTOR PROTECTION CORPORATION
485 L'ENFANT PLAZA, S.W. • SUITE 2150
WASHINGTON, D.C. 20024 • (202) 484-5400

2304-001L
Midland Equity Corporation
160 Broadway
New York NY 10038

OCT. 3 1972

Gentlemen:

Based upon the reports of your SIPC collection agent through September 2, 1972, our records indicate the following listed SIPC forms and assessment payments made, as well as apparent failure to file or pay, which should be compared with your records promptly:

	Filed	Amount Paid	Apparent Deficiency: Did not File	Other
Initial assessment (based on 1969 revenues)	✓	$ 150.-		
1970 general assessment (Form SIPC-6)				
1st Quarter	✓	150 - paid		
2nd Quarter				
3rd Quarter				
4th Quarter				
1971 reconciliation (Form SIPC-7)			✓	
1972 general assessment (Form SIPC-6)				
1st Quarter			✓	
2nd Quarter			✓	
Exclusion claimed (Form SIPC-3)				
1971				
1972				

Within ten days from the above date, will you please:

a) Mail overdue form(s) together with any payment due to your SIPC collection agent, NASD, and

b) Insert here the date _____ form(s) and payment in a) were mailed to your SIPC collection agent and the amount thereof $_____.

c) If you disagree with the apparent deficiency(ies) above, send explanation to your SIPC collection agent.

d) IN ADDITION TO a), b), AND c) ABOVE, RETURN ONE COPY OF THIS LETTER [AND A COPY OF ANY LETTER SENT TO YOUR COLLECTION AGENT PURSUANT TO c) ABOVE] TO SIPC IN THE ENCLOSED SELF-ADDRESSED ENVELOPE.

We wish to call to your attention Section 10 (a) of the Securities Investor Protection Act of 1970 which is quoted in part as follows:

"(A) FAILURE TO PAY ASSESSMENT, ETC. - IF A MEMBER OF SIPC SHALL FAIL TO FILE ANY REPORT OR INFORMATION REQUIRED PURSUANT TO THIS ACT, OR SHALL FAIL TO PAY WHEN DUE ALL OR ANY PART OF AN ASSESSMENT MADE UPON SUCH MEMBER PURSUANT TO THIS ACT, AND SUCH FAILURE SHALL NOT HAVE BEEN CURED, BY THE FILING OF SUCH REPORT OR INFORMATION OR BY THE MAKING OF SUCH PAYMENT, TOGETHER WITH INTEREST THEREON, WITHIN FIVE DAYS AFTER RECEIPT BY SUCH MEMBER OF WRITTEN NOTICE OF SUCH FAILURE GIVEN BY OR ON BEHALF OF SIPC, IT SHALL BE UNLAWFUL FOR SUCH MEMBER, UNLESS SPECIFICALLY AUTHORIZED BY THE COMMISSION, TO ENGAGE IN BUSINESS AS A BROKER OR DEALER. . ."

Very truly yours,

SECURITIES INVESTOR PROTECTION CORPORATION

Ref 1

Lloyd W. McChesney

Lloyd W. McChesney
Vice President - Finance

(*d*) Every such member, broker, and dealer shall preserve during the life of the enterprise and of any successor enterprise all partnership articles or, in the case of a corporation, all articles of incorporation or charter, minute books, and stock certificate books.

(*e*) Every such member, broker and dealer shall maintain and preserve in an easily accessible place all records required under subparagraph (12) of Rule 17a-3 until at least 3 years after the "associated person" has terminated his employment and any other connection with the member, broker or dealer.

(*f*) After a record or other document has been preserved for 2 years, a photograph thereof on film may be substituted therefor for the balance of the required time.

(*g*) If a person who has been subject to Rule 17a-3 ceases to transact a business in securities directly with others than members of a national securities exchange, or ceases to transact a business in securities through the medium of a member of a national securities exchange, or ceases to be registered pursuant to section 15 of the Securities Exchange Act of 1934, as amended, such person shall, for the remainder of the periods of time specified in this rule, continue to preserve the records which he theretofore preserved pursuant to this rule.

(Amended subpara. (5) to para. (b) Jan. 18, eff. Mar. 1, 1967, Release 34-8023.)

Rule 17a-5. Reports To Be Made by Certain Exchange Members, Brokers, and Dealers

(*a*) **Filing Reports.** This rule shall apply to every member of a national securities exchange who transacts a business in securities directly with or for others than members of a national securities exchange, every broker or dealer (other than a member) who transacts a business in securities through the medium of any member of a national securities exchange, and every broker or dealer registered pursuant to section 15 of the Act.

Every member, broker or dealer subject to this rule shall file reports of financial condition containing the information required by Form X-17A-5, as follows: (A) a report shall be filed as of a date within each calendar year, except that (i) the first such report of a member, broker or dealer (other than one succeeding to and continuing the business of another member, broker or dealer) shall be as of a date not less than 1 nor more than 5 months after the date on which such member, broker or dealer becomes subject to this rule (in the case of a registered broker or dealer this shall be the date the registration becomes effective) and (ii) a member, broker or dealer succeeding to and continuing the business of another member, broker or dealer need not file a report as of a date in the calendar year in which the succession occurs if the predecessor member, broker or dealer has filed a Form X-17A-5 report in compliance with this rule as of a date in such calendar year; (B) such reports shall be filed not more than 45 days after the date of the report of financial condition; and (C) reports for any 2 consecutive years shall not be as of dates within 4 months of each other. The reports provided for in this rule shall be filed in duplicate original with the Regional Office of the Commission for the region in which the member, broker or dealer has his or its principal place of business.

(*b*) **Nature and Form of Reports.** Each report of financial condition filed pursuant to paragraph (*a*) hereof shall be prepared and filed in accordance with the following requirements:

(1) The report of a member, broker or dealer shall be certified by a certified public accountant or a public accountant who shall be in fact independent: *Provided, however*, That such report need not be certified if, since the date of the previous financial statement or report filed pursuant to Rule 15b1-2 or 17a-5; (A) said member has not transacted a business in securities directly with or for others than members of a national securities exchange; has not carried any margin account, credit balance or security for any person other than a general partner; and has not been required to file a certified financial statement with any national securities exchange; or (B) his or its securities business has been limited to acting as broker (agent) for the issuer in soliciting subscriptions for securities of such issuer, said broker has promptly transmitted to such issuer all funds and promptly delivered to the subscriber all securities received in connection therewith, and said broker has not otherwise held funds or securities for or owed money or securities to customers; or (C) his or its securities business has been limited to buying and selling evidences of indebtedness secured by mortgage, deed or trust, or other lien upon real estate or leasehold interest, and said broker or dealer has not carried any margin account, credit balance, or security for any securities customer.

Ref 2

aaa. Short title

chapter may be cited as the "Securities Investor Protection Act
".

91-598, § 1(a), Dec. 30, 1970, 84 Stat. 1636.

Historical Note

tive History. For legislative his- purpose of Pub.L. 91-598, see 1970 U.S.Code Cong. and Adm.News, p. 5254.

cbb. Application of Securities Exchange Act of 1934

ot as otherwise provided in this chapter, the provisions of the es Exchange Act of 1934 (hereinafter referred to as the "1934 pply as if this chapter constituted an amendment to, and was l as a section of, such Act.

91-598, § 2, Dec. 30, 1970, 84 Stat. 1637.

Historical Note

ces in Text. The Securities Ex- ct of 1934, referred to in text, is 6, 1934, c. 404, 48 Stat. 881, classified to section 78a et seq. le.

Legislative History. For legislative history and purpose of Pub.L. 91-598, see 1970 U.S.Code Cong. and Adm.News, p. 5254.

§ 78ccc. Securities Investor Protection Corporation

(a) Creation.—There is hereby established a body corporate to be known as "Securities Investor Protection Corporation" (hereafter in this chapter referred to as "SIPC"). SIPC shall be a nonprofit corporation and shall have succession until dissolved by act of the Congress. SIPC shall—

(1) not be an agency or establishment of the United States Government;

(2) be a membership corporation the members of which shall be—

(A) all persons registered as brokers or dealers under section 78*o*(b) of this title, and

(B) all persons who are members of a national securities exchange,

other than persons whose business as a broker or dealer consists exclusively of (i) the distribution of shares of registered open end investment companies or unit investment trusts, (ii) the sale of variable annuities, (iii) the business of insurance, or (iv) the business of rendering investment advisory services to one or more registered investment companies or insurance company separate accounts; and

(3) except as otherwise provided in this chapter, be subject to, and have all the powers conferred upon a nonprofit corporation by, the District of Columbia Nonprofit Corporation Act (D.C. Code, sec. 29-1001 and fol.).

(b) Powers.—In addition to the powers granted to SIPC elsewhere in this chapter, SIPC shall have the power—

(1) to sue and be sued, complain and defend, in its corporate name and through its own counsel, in any court, State, or Federal;

(2) to adopt, alter, and use a corporate seal, which shall be judicially noticed;

(3) subject to the provisions of this chapter, to adopt, amend, and repeal, by its Board of Directors, bylaws and rules relating to the conduct of its business and the exercise of all other rights and powers granted to it by this chapter;

(4) to conduct its business (including the carrying on of operations and the maintenance of offices) and to exercise all other rights and powers granted to it by this chapter in any State or other jurisdiction without regard to any qualification, licensing, or other statute in such State or other jurisdiction;

(5) to lease, purchase, accept gifts or donations of or otherwise acquire, to own, hold, improve, use, or otherwise deal in or with, and to sell, convey, mortgage, pledge, lease, exchange or

Note 9

which it was alleged that salesman employed by brokers had improperly handled customer's account presented no facts in brief or by affidavit to show that they acted in good faith by taking precautionary measures to prevent injury suffered, it was presumed for purpose of deciding their motion to dismiss or, in the alternative, for summary judgment that requirements of good faith did not exist although if they had existed they would merely have raised question of fact to be determined at trial. Lorenz v. Watson, D.C.Pa. 1966, 258 F.Supp. 724.

10. Evidence

Evidence sustained finding that adequate internal supervision by brokerage firm would have prevented loss t
er arising from representative's
of two particular issues of cust
curities to representative's
through fraud and deceit. Hec
ris, Upham & Co., C.A.Cal.1970
1202.

11. Findings

Finding of district court that
brokerage firm representative
by customer for damages ari
the handling of her account did
ly and fairly explain basic co
which would have indicated
trading actually going on was
erroneous. Hecht v. Harris, U
C.A.Cal.1970, 430 F.2d 1202.

§ 78u. Investigations; injunctions and prosecuti
fenses

(a) The Commission may, in its discretion, make such
tions as it deems necessary to determine whether any
violated or is about to violate any provision of this chap
rule or regulation thereunder, and may require or permit
to file with it a statement in writing, under oath or other
Commission shall determine, as to all the facts and cir
concerning the matter to be investigated. The Commissio
ized in its discretion, to publish information concerning a
lations, and to investigate any facts, conditions, practices
which it may deem necessary or proper to aid in the enf
the provisions of this chapter, in the prescribing of rul
lations thereunder, or in securing information to serv
for recommending further legislation concerning the
which this chapter relates.

(b) For the purpose of any such investigation, or an
ceeding under this chapter, any member of the Commi
officer designated by it is empowered to administer oat
mations, subpena witnesses, compel their attendance, t
and require the production of any books, papers, co
memoranda, or other records which the Commission d
or material to the inquiry. Such attendance of witn
production of any such records may be required from
the United States or any State at any designated place

(c) In case of contumacy by, or refusal to obey a s
to, any person, the Commission may invoke the aid o
the United States within the jurisdiction of which s
tion or proceeding is carried on, or where such per
carries on business, in requiring the attendance and
witnesses and the production of books, papers, corres
oranda, and other records. And such court may iss

quiring such person to appear before the Commission or member or officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found. Any person who shall, without just cause, fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, and other records, if in his power so to do, in obedience to the subpena of the Commission, shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine of not more than $1,000 or to imprisonment for a term of not more than one year, or both.

(d) Repealed. Pub.L. 91–452, Title II, § 212, Oct. 15, 1970, 84 Stat. 929.

(e) Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule or regulation thereunder, it may in its discretion bring an action in the proper district court of the United States or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who may, in his discretion, institute the necessary criminal proceedings under this chapter.

(f) Upon application of the Commission the district courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States, shall also have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this chapter or any order of the Commission made in pursuance thereof or with any undertaking contained in a registration statement as provided in subsection (d) of section 78o of this title.

June 6, 1934, c. 404, § 21, 48 Stat. 899; May 27, 1936, c. 462, § 7, 49 Stat. 1379; June 25, 1936, c. 804, 49 Stat. 1921; June 25, 1948, c. 646, § 32(b), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107; Oct. 15, 1970, Pub.L. 91–452, Title II, § 212, 84 Stat. 929.

Historical Note

References in Text. This chapter, referred to in subsecs. (a), (b), (c) and (f), in the original read "This Act." See codification note under section 78a of this title.

Codification. The words "the district court of the United States for the District of Columbia" following "district court of the United States" in subsec. (c) and "district courts of the United States" in

it by this chapter. If any such broker, dealer, or other person fail to make any such report or fail to furnish full information in, or, if in the judgment of the Board it is otherwise nece such broker, dealer, or other person shall permit such inspe to be made by the Board with respect to the business operatio such broker, dealer, or other person as the Board may deem n sary to enable it to obtain the required information.

June 6, 1934, c. 404, § 17, 48 Stat. 897; Aug. 23, 1935, c. 614, § 20 49 Stat. 704; May 27, 1936, c. 462, § 4, 49 Stat. 1379; June 25, c. 677, § 5, 52 Stat. 1076

Historical Note

References in Text. This chapter, referred to in subsec. (b), in the original read "This Act". See codification note under section 78a of this title.

1938 Amendment. Subsec. (a). Act June 25, 1938 inserted "every registered securities association."

1936 Amendment. Subsec. (a). Act May 27, 1936 substituted "every broker or dealer registered pursuant to section 78o of this title" in place of "every broker or dealer making or creating a market for both the purchase and sale of securities through the use of the mails or of any means or instrumentality of interstate commerce".

Change of Name. Subsection amended by Act Aug. 23, 1935, which stituted "Board of Governors of the eral Reserve System" for "Federa serve Board".

Transfer of Functions. All exe and administrative functions of the rities and Exchange Commission with certain exceptions, transferred Chairman of such Commission, wit thority vested in him to authorise performance by any officer, employ administrative unit under his jurisd by 1950 Reorg. Plan No. 10, §§ 1, May 24, 1950, 15 F.R. 3175, 64 Stat. set out as a note under section 78d o title.

Cross References

Rules and regulations, power of Commission and Board of Governors of Federa serve System to make, see section 78w of this title.

Notes of Decisions

Generally 1
Claims of violations 6
Failure to submit reports 5
Foreign corporations, compliance by 2
Inspection of books and records
  Generally 3
  Scope of 4

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1. Generally

This section relating to accounts and records, reports, and examinations of exchanges, members and others creates no substantive liability but provides a remedy for violation of other provisions of this chapter, and in and of itself it describes no remedy for an alleged violation, so that such must stand or fall on a showing of violation of some other specific provision of this chapter. Rippey v. Denver U. S. Nat. Bank, D.C.Colo.1966, 260 F.Supp. 704.

2. Foreign corporations, compliance

Swiss law did not preclude Panam corporation with principal office Switzerland and branch in Puerto from complying with Commission's mand for books and records. Fontai Securities and Exchange Commissio C.Puerto Rico 1966, 259 F.Supp. 88

3. Inspection of books and records— erally

Where a registered broker-dealer i volved, the Commission must be fr inspect all books and records which required to be kept under this cha Fontaine v. Securities and Exchange mission, D.C.Puerto Rico 1966, 25 Supp. 880.

4. —— Scope of

Where Commission sought books records from Panamanian corpora

with principal offices in Switzerland and branch in Puerto Rico, it was responsibility of Commission, and not of courts, to determine extent, if any, to which public interest would permit accommodation between disclosure requirements under this chapter and secrecy requirements of foreign law. Fontaine v. Securities and Exchange Commission, D.C.Puerto Rico 1966, 260 F.Supp. 880.

5. Failure to submit reports

Finding of willful failure to comply with Commission's regulations requiring broker-dealer to submit reports certified by certified public accountant or qualified public accountants warranted orders revoking his broker-dealer registration, expelling him from national association of securities dealers and denying him registration as an investment adviser. Boruski v. Securities and Exchange Commission, C.A.2, 1965, 340 F.2d 991, certiorari denied 85 S.Ct. 1545, 1567, 1780, 1784, 381 U.S. 917, 928, 943, 944, 14 L.Ed.2d 437, 686, 706, 707.

6. Claims of violations

Claim of beneficiaries bringing action against, inter alia, trustee bank for alleged misuse of trust funds, that bank violated this section relating to accounts and records, was insufficient in law and would be dismissed where beneficiaries did not allege that any of the defendants fell within the classes of persons to whom the record-keeping and preservation requirement of this chapter applied. Rippey v. Denver U. S. Nat. Bank, D.C.Colo. 1966, 260 F.Supp. 704.

§ 78r. Liability for misleading statements

(a) Any person who shall make or cause to be made any statement in any application, report, or document filed pursuant to this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78o of this title, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, shall be liable to any person (not knowing that such statement was false or misleading) who, in reliance upon such statement, shall have purchased or sold a security at a price which was affected by such statement, for damages caused by such reliance, unless the person sued shall prove that he acted in good faith and had no knowledge that such statement was false or misleading. A person seeking to enforce such liability may sue at law or in equity in any court of competent jurisdiction. In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant.

(b) Every person who becomes liable to make payment under this section may recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment.

(c) No action shall be maintained to enforce any liability created under this section unless brought within one year after the discovery of the facts constituting the cause of action and within three years after such cause of action accrued.

June 6, 1934, c. 404, § 18, 48 Stat. 897; May 27, 1936, c. 462, § 5, 49 Stat. 1379.

profits by insiders by encouraging suits by stockholders to recover such profits for corporation, and by making an allowance which is not "too niggardly" and which will often provide the sole stimulus for the enforcement of this section. Magida v. Continental Can Co., D.C.N.Y.1956, 176 F. Supp. 781.

Where attorney for a stockholder brought an action to recover short-swing profits made by a majority stockholder and $47,000 was recovered for benefit of corporation, attorney was allowed $12,000 for his services and disbursements. Id.

Where parties negotiated stipulation of settlement wherein individual defendants agreed to pay approximately $45,000 in full settlement of all claims of corporation for short-swing profits after stockholder had instituted suit against them pursuant to this section permitting suit to recover profits obtained by beneficial owner, director or officer by reason of his relationship to issuer, 40% of settlement amount agreed upon by parties as attorney's fees for stockholder, seemed exorbitant and stockholder would be required to move for allowance of attorney's fees and disbursements upon detailed proof of services performed, upon notice to defendants' attorneys who would state a position thereon, and upon notice to Regional Office of Commission, which would be requested to state its opinion upon amount of counsel fees and disbursements to be allowed out of amount recovered for corporation. Blau v. Allen, D.C.N.Y.1959, 171 F.Supp. 609.

Where services of stockholder's attorney under contingent fee contract contributed to settlement whereby corporation's president, ten months before limitations would have run against corporation's right of action to recover $57,872 profits made by president on sale of stock paid such profits to corporation, and 4 per cent. interest on such sum for ten months would be $1,929.05, stockholder could recover $1,000 from corporation. Dottenheim v. Emerson Elec. Mfg. Co., D.C.N.Y.1948, 77 F.Supp. 306.

Amount of attorney's fees which would be allowed in event of recovery in federal District Court in New York action to recover short-swing profits allegedly realized by plaintiff's principal stockholders would be subject to approval by court. Molybdenum Corp. of America v. International Min. Corp., D.C.N.Y.1963, 32 F.R.D. 415.

100. Taxation

Where taxpayer sold securities issued by his employer, realizing long-term capital gain, to secure funds needed t
cise stock option, where, withi
months, taxpayer exercised such
purchasing securities issued by h
ployer, and where thereafter tax
without admitting liability, paid t
ployer difference between sale pric
purchase price, which employer ha
manded on ground that it represente
sider" profit in violation of this s
the amount of the payment wou
treated as long-term capital loss,
than ordinary and necessary busine
pense, notwithstanding business pu
of such payment. Mitchell v. C. I.
A.Mich.1970, 428 F.2d 259.

Amount which director, officer, o
son owning more than ten per cent o
porate stock is required to pay into c
ration as insider's short-term profits
ized from dealing in corporation's s
ties is taxable income to corporatio
though it does not represent "profi
corporation. C. I. R. v. Obear-N
Glass Co., C.A.7, 1954, 217 F.2d 56, cer
ri denied 75 S.Ct. 570, 348 U.S. 982,
Ed. 764, rehearing denied 75 S.Ct. 87
U.S. 948, 99 L.Ed. 1274.

Corporate officer's voluntary pay
to corporation of difference between
proceeds of stock shares and cost o
quiring similar number, on exercis
stock option 6 months later, was ded
ble as business expense and not
as capital loss for alleged insider's p
under Arrowsmith, since payment
divorced from either stock sale w
was completed taxable transaction o
ter stock purchase on which no tax
sequence took place, having grown
rectly from sale-purchase occurrence
only securities law significance and
ing been made to avoid injury to b
ness reputation, unfortunate publi
and expensive litigation and not in
cession of liability for securities law
lation. Mitchell v. C. I. R., 1969, 52
170.

101. Review

Findings that brokerage and investm
banking partnership had not actually d
utized partner to represent its interests
director of corporation and that it
not his advice and counsel based on s
cial and "inside" knowledge, gained
director, that caused partnership to b
and sell stock, recovery of "short swi
profits on which was sought, were
clearly erroneous. Blau v. Lehman, N
1962, 82 S.Ct. 451, 368 U.S. 403, 7 L.Ed.
403.

Certiorari was granted in action for
covery of "short swing profits", und

this section, to determine whether courts below had erred in refusing to render judgment against brokerage and investment banking partnership of which corporate director was member for profits partnership realised from "short swing" transactions, in refusing to render judgment against partner-director for full profits, and in refusing to allow interest on recovery allowed against him for his proportionate share of profits realized. Id.

District Court's determination that common stock acquired by director upon conversion of debentures was not exempt "as a security acquired in good faith in connection with a debt previously contracted" within exemption to provision of this chapter pertaining to short-swing insider profits was supported by record. Heli-Coil Corp. v. Webster, C.A.N.J.1965, 352 F.2d 156.

Record in action to recover short swing profits made by corporate insider did not reveal evidence of such inequities as would warrant reversal of trial court on basis that it abused its discretion in granting interest on amount recoverable. Western Auto Supply Co. v. Gamble-Skogmo, Inc., C.A.Minn.1965, 348 F.2d 736. Certiorari denied 86 S.Ct. 556, 382 U.S. 987, 15 L.Ed.2d 475.

102. Remand

Where it was not entirely clear what trial judge would have found if he had followed proper rule in determining sufficiency of proof as to short swing profits, reviewing court would, in reversing judgment for defendant, remand with directions to make a specific finding on that issue in light of reviewing court's statement of rule. Stella v. Graham-Paige Motors Corp., C.A.N.Y.1956, 232 F.2d 299, certiorari denied 77 S.Ct. 46, 352 U.S. 831, 1 L.Ed.2d 52.

103. Res judicata

Judicially approved settlement in sharply contested shareholder's derivative suit, rescinding stock transactions between corporation and its chairman and president and between corporation and a foundation of which chairman and president was trustee and providing for his resignation and cancellation of his stock option was binding upon corporation, all its stockholders and other parties to suit, cancelling and rescinding the challenged stock transactions, rendering issue of liability of chairman and president for short-swing profits with respect to the transactions, under this chapter, res judicata in subsequent action by another shareholder. Hennessey v. Fein, D.C.N.Y. 1958, 184 F.Supp. 86.

§ 78q. Accounts and records, reports, examinations of exchanges, members and others

(a) Every national securities exchange, every member thereof, every broker or dealer who transacts a business in securities through the medium of any such member, every registered securities association, and every broker or dealer registered pursuant to section 78o of this title, shall make, keep, and preserve for such periods, such accounts, correspondence, memoranda, papers, books, and other records, and make such reports, as the Commission by its rules and regulations may prescribe as necessary or appropriate in the public interest or for the protection of investors. Such accounts, correspondence, memoranda, papers, books, and other records shall be subject at any time or from time to time to such reasonable periodic, special, or other examinations by examiners or other representatives of the Commission as the Commission may deem necessary or appropriate in the public interest or for the protection of investors.

(b) Any broker, dealer, or other person extending credit who is subject to the rules and regulations prescribed by the Board of Governors of the Federal Reserve System pursuant to this chapter shall make such reports to the Board as it may require as necessary or appropriate to enable it to perform the functions conferred upon

reproduced in a manner authorized by this rule may be inserted in the appendix; such pages may be informally renumbered if necessary.

If briefs are produced by commercial printing or duplicating firms, or, if produced otherwise and the covers to be described are available, the cover of the brief of the appellant should be blue; that of the appellee, red; that of an intervenor or amicus curiae, green; that of any reply brief, gray. The cover of the appendix, if separately printed, should be white. The front covers of the briefs and of appendices, if separately printed, shall contain: (1) the name of the court and the number of the case; (2) the title of the case (see Rule 12(a)); (3) the nature of the proceeding in the court (e. g., Appeal; Petition for Review) and the name of the court, agency, or board below; (4) the title of the document (e. g., Brief for Appellant, Appendix); and (5) the names and addresses of counsel representing the party on whose behalf the document is filed.

(b) Form of Other Papers. Petitions for rehearing shall be produced in a manner prescribed by subdivision (a). Motions and other papers may be produced in like manner, or they may be typewritten upon opaque, unglazed paper 8½ by 11 inches in size. Lines of typewritten text shall be double spaced. Consecutive sheets shall be attached at the left margin. Carbon copies may be used for filing and service if they are legible.

A motion or other paper addressed to the court shall contain a caption setting forth the name of the court, the title of the case, the file number, and a brief descriptive title indicating the purpose of the paper.

Notes of Advisory Committee on Appellate Rules

Only two methods of printing are now generally recognized by the circuits—standard typographic printing and the offset duplicating process (multilith). A third, mimeographing, is permitted in the Fifth Circuit. The District of Columbia, Ninth, and Tenth Circuits permit records to be reproduced by copying processes. The Committee feels that recent and impending advances in the arts of duplicating and copying warrant experimentation with less costly forms of reproduction than those now generally authorized. The proposed rule permits, in effect, the use of any process other than the carbon copy process which produces a clean, readable page. What constitutes such is left in first instance to the parties and ultimately to the court to determine. The final sentence of the first paragraph of subdivision (a) is added to allow the use of multilith, mimeograph, or other forms of copies of the reporter's original transcript whenever such are available.

Cross References

Typewritten briefs, appendices, and other papers allowed in forma pauperis, see rule 24(c).

Library References

Courts ⟸405(16.4) et seq.

C.J.S. Federal Courts § 295(10).

Notes of Decisions:

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1. Generally

Former rule obtaining in some circuits, which dispensed altogether with the printing of a record, and which required counsel to print in their briefs such part of the record as they thought appropriate, did not apply in the Fifth Circuit. Phillips Petroleum Co. v. Williams, C.C.A.Tex.1947, 159 F.2d 1011.

2. Sanctions for failure to comply

Where brief of the appellees was not in conformity with former court rule as to form, the appellees would be denied recovery of their costs on appeal. Utility Service Corp. v. Hillman Transp. Co., C.A.Pa.1957, 244 F.2d 121.

3. Relief from printing requirement

Relief from requirement of printing appendix is freely granted those financially burdened by fulfilling requirements of printing. Arnold Productions Inc. v. Favorite Films Corp., C.A.N.Y.1961, 291 F. 2d 94.

4. Typewritten briefs

Where good cause appeared, movant's motion to proceed on typewritten briefs on appeal in habeas corpus proceeding was granted. Fleish v. Swope, C.A.9, 1955, 221 F.2d 558.

Rule 33. Prehearing Conference

The court may direct the attorneys for the parties to appear before the court or a judge thereof for a prehearing conference to consider the simplification of the issues and such other matters as may aid in the disposition of the proceeding by the court. The court or judge shall make an order which recites the action taken at the conference and the agreements made by the parties as to any of the matters considered and which limits the issues to those not disposed of by admissions or agreements of counsel, and such order when entered controls the subsequent course of the proceeding, unless modified to prevent manifest injustice.

Notes of Advisory Committee on Appellate Rules

The uniform rule for review or enforcement of orders of administrative agencies, boards, commissions or officers (see the general note following Rule 15) authorizes a prehearing conference in agency review proceedings. The same considerations which make a prehearing conference desirable in such proceedings may be present in certain cases on appeal from the district courts. The proposed rule is based upon subdivision 11 of the present uniform rule for review of agency orders.

Cross References

Pre-trial procedure in the district courts, see Rule 16, Federal Rules of Civil Procedure, 28 U.S.C.A.

Library References

Appeal and Error ⇐820 et seq.
Courts ⇐405(14.8).

C.J.S. Federal Courts §§ 284, 293(1, 17), 309(1).

15. Sufficiency of affidavits, exhibits, etc.

Affidavits, on which plaintiff was granted attachment of defendant's assets in action for breach of contract to assume individual liability for plaintiff's losses because of breaches of sale contracts by corporation of which defendant was president and principal stockholder, established prima facie cause of action for breach of contract, as required to entitle plaintiff to attachment under law, C.P.A. §§ 822, 903, subdiv. 6, 918, 949, [now McKinney's N.Y. CPLR, 6118, 6201, 6212, 2308, 6223] for purposes of defendant's motion to vacate attachment. Republic of Italy v. De Angelis, D.C.N.Y. 1952, 106 F.Supp. 605, affirmed 206 F.2d 121.

In action for breach of contract to assume individual liability for losses sustained by plaintiff because of breaches of sale contracts by corporation of which defendant was president and principal stockholder, papers on which plaintiff was granted attachment of defendant's assets under New York Law, C.P.A. §§ 903, subdiv. 6, 918, 949, [now McKinney's N.Y. CPLR 6201, 6212, 2308, 6223], sufficiently established, for purposes of defendant's motion to vacate attachment plaintiff's reliance on nonexistence of facts, fraudulently concealed by defendant, that corporation had been dissolved and denuded of its assets, though defendant disclosed to plaintiff, at conference resulting in execution of contract, that corporation was in financial difficulty. Id.

United States District Court for Massachusetts, having jurisdiction on basis of diversity of citizenship of action for damages for assault upon plaintiff and economic interference, had no jurisdiction under either Massachusetts or federal law to grant an injunction before verdict in the nature of equitable attachment restraining defendant from alienating or encumbering his stock in specified corporations. Daley v. Ort, D.C.Mass.1951, 98 F.Supp. 151.

Where federal district court for Eastern District of Washington did not and could not obtain jurisdiction of person of defendant, in action on promissory notes, by service of process upon Lim in state of Washington, such jurisdiction could not be acquired by garnishment of that defendant's funds in registry of court. McDowell v. Davies, D.C.Wash.1951, 96 F.Supp. 301.

Where warrant of attachment was issued on extensive affidavits, exhibits, and complaint, and thereafter second amended complaint was filed containing cause of action for breach of contract and for money had and received under implied contract, and fraud was alleged incidentally to show how breach came about, and second count was amply supported by affidavits and exhibits, court would not vacate warrant on ground that complaint pleaded action in tort. Republic of Poland v. Pan-Atlantic, Inc., D.C.N.Y.1950, 92 F.Supp. 330.

Where affidavits and exhibits offered in support of warrant of attachment were sufficient to justify issuance of warrant, complaint could be disregarded in determining whether warrant was properly issued. Id.

16. Jurisdiction

Federal district courts lack power to secure original jurisdiction over a nonresident defendant by attachment of its property. Dry Clime Lamp Corp. v. Edwards, C.A.Miss.1968, 389 F.2d 500.

The basis of a court's power to assert in rem jurisdiction is its control of the property on which the judgment will operate, and the res must be actually or constructively within reach of the court. State of N. J. v. Moriarity, D.C.N.J.1967, 268 F.Supp. 546.

The singular characteristic of in rem actions is simply its power to adjudicate the rights of all persons in the thing and, in that sense, it is directed against all persons interested in the res. Id.

In rem actions are directed against the res itself, rather than against the claimants, although, in a more fundamental sense, adjudication is always directed against people because it is always a determination of rights and privileges or duties and liabilities. Id.

Attachment as on foreign attachment of vessel of owner, sued under Jones Act, section 688 of Title 46, for unseaworthiness, and maintenance and cure, did not constitute basis for jurisdiction in rem, where ship attached was not the ship on which accident occurred. Leith v. Oil Transport Co., D.C.Pa.1962, 210 F.Supp. 877, affirmed 321 F.2d 591.

Louisiana shipowner's posting of bond for value to dissolve foreign attachment did not confer jurisdiction on district court sitting in Pennsylvania to entertain claim of Tennessee citizen under Jones Act, section 688 of Title 46, for unseaworthiness, and maintenance and cure. Id.

Rule 65. Injunctions

(a) Preliminary Injunction.

(1) *Notice.* No preliminary injunction shall be issued without notice to the adverse party.

(2) *Consolidation of Hearing with Trial on Merits.* Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a) (2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

(b) Temporary Restraining Order; Notice; Hearing; Duration. A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

Ref. 7

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION Plaintiff, -against- MIDLAND EQUITY CORPORATION JAMES JOSEPH HAMMARTH Defendants.	:	73 Civil Action File No. 2617 (LPG) AFFIDAVIT OF APPEARANCE

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

JAMES J. HAMMARTH, being duly sworn, deposes and says:

1. I, JAMES J. HAMMARTH am no longer an officer, director or employee of Midland Equity Corporation and so I am therefore making this appearance solely in my own behalf.

2. A preliminary injunction pursuant to rule 65 of the Federal Rules of Civil Procedure should not be granted as requested by the plaintiff SECURITIES AND EXCHANGE COMMISSION for the reasons listed below:

3. FAULTY SERVICE OF PROCESS. Process was served on my wife Marcia at 5:45 P.M. Friday, June 15 by one Joseph Schwartz who said "Give this to your husband". I was engaged elsewhere. I make this appearance to avert the consequences of some new type of "SEWER SERVICE" concocted by the SECURITIES AND EXCHANGE COMMISSION or its servants.

4. A continuing knowledge of the situation of MIDLAND EQUITY CORPORATION

Ref 8

as evidenced by:

1. Affidavit of George C. Appoldt dated 12 June 73 testifying to his visit on 26 October 1972.

2. Michael T. Gregg's affidavit dated 12 June 1973 testifying to

a. My call 15 December 1972

b. Mr. Gregg's letter dated 31 January 1973

Gave the commission ample time to give notice of motion as required by Rule 9(c)(4) of the General Rules of the United States District Courts for Southern and Eastern District of New York, rather than by order to show cause and temporary restraining order.

I submit this was done to unfairly jeopardize the defendant without cause, as shown in the following sequence of events:

a. Mr. Gregg filed his petition in U.S. District Court 12 June 3:52 p.m. 1973 (Ref Complaint 73 Civil Action 2617)

b. He alleges to have called me at about 4:30 P.m. on 12 June 73 to notify me of his filing

c. Mr. Gregg further alleges to have called me at my former address at 4:35 p.m. and allows as how he made no notification

d. On 13 June 1973 at 10:25 a.m. Mr. Gregg alleges to have called me and left a message advising me that the Commissions Staff would seek a temporary restraining order and an order to show cause which he managed to have issued by 12:45 p.m. on the 13th of June 1973.

Would I that my access to justice was so swift and easy as his bringing sanctions against me through the abuse of notice provision.

RF

5. Mr. Gregg's complete disregard for the requirement that he rspresent a clear and specific showing of good and sufficient reason is demonstrated by his testimony (Ref Affidavit 73 Civil Action File No. 2617 (LPG)

a. He alleges to have mailed a letter dated 31 January 73 renewing a demand to permit an inspection

b. He alleges to have telephoned the offices of Midland on or about 17 May 1973 leaving a message.

Some estimate of the vigor with which Mr. Gregg pursued his investigation can be gleaned from a lapse of 3½ months between an alleged letter and an alleged phone call.

Suddenly, we find Mr. Gregg reacting with great alarm to the perception of danger as evidenced by the spurt of forceful activity demonstrated on 12 and 13 June 1973. (Ref. Affidavit Michael T. Gregg 73 Civil Action File No. 2617 (LPG) and AFFIDAVIT OF NOTICE 73 Civil Action File No. 2617 (LPG).

I feel that his good faith in requesting an order to show cause rather than proceeding by notice of motion, as required by Rule 9(c)(4) of General Rules of the United States District Courts, for the Southern and Eastern District of New York is open to question.

6. That in the period in question while under by stewardship Midland Equity Corporation was prohibited from engaging in business as a broker or dealer by the provisions of Public Law 91-598 December 30 1970. See exhibit 1 and 2.

It is my contention that any activity in this area would have exposed me

and the firm with which I was then associated to the penalties of the SIPC act which are dire.

This act cuts off all authority for the various Exchanges, the NASD and indeed the SEC (in the case of SECO brokers) to permit broker dealer operations. The law states clearly that "it shall be unlawful for such member unless specifically authorized by the Commission to engage in business as a broker or dealer." Midland had not applied for or received such permission.

I assumed then, and must assume now that this verbiage cuts off the privileges associated with registration as a broker dealer.

As to what acts are permitted after a cut off by the "SIPC" law, I feel now as I did then, that I must wait upon a clarification by either the Securities Investor Protection Corporation or the Securities and Exchange Commission as to what constitutes activity as a broker dealer.

7. The applicability of the so called bookkeeping rules, 17a-4, 17 CFR 240.17a-4 which require that books and records of a broker dealer be preserved for a given period of time are called into question in the following fashion:

a. Subsection a applies to member, broker or dealer subject to Rule 17a-3 to wit.

> "(a) Every member, broker, and dealer subject to rule 17a-3 shall preserve for a period of not less than 6 years, the first 2 years in an easily accessible place all records required to be made pursuant to paragraphs 1,2,3 and 5 of Rule 17a-3. "

This section is clearly not applicable to a firm that has ceased to be a member. Ref SIPC letter dated 3 October 1972 and Public Law 91-598 December 30 1970, Exhibits 1 and 2 attached.

8. Subsection (g) of Rule 17a-4, 17 CFR 240.17a-4 is applicable to persons who have ceased to transact business, not persons who are barred by law from doing business. This must be so because record keeping requirements under this section flow from the basic authority of the Commission over broker dealers and in this instance broker dealers still registered but not active or broker dealers who withdraw under the agreements in form BDW, an official Commission form used by a broker dealer to effect withdrawl.

There is an element of voluntariness in "cease" which is clear. To stop moving, acting or speaking. (Webster Encyclopedia Dictionary, Chicago 1970).

Further, the element of voluntariness of cessation in this provision is underlined and strengthened by the fact that there is no provision made for storage of records of firms which are prevented from operating by forces external to them such as bankruptcy, a member or members' absconding with the assets, incapacitation of a principle and liquidation of his holdings, the imprisonment of firm principles, military service of firm principles in time of war.

In these instances some public institution would be required to provide the shelter and financial resources for maintenance of these records and no such provision is made in the act.

To what degree should an entity faced with this dilemma place himself under the jurisdiction of the Exchange Commission which is limited to broker dealers? Until this question is resolved this section operates as a kind of "Catch 22" exposing the regulated to probable security law violation penalties without the slightest contemplated violation.

9. If Midland at the time of my stewardship was subject to the provisions of Rule 17a-4(g), (Ref Rule 17a4, 17 CFR 240.17a-4, page 4 Memorandum of Law In Support of 73 Civil Action File No 2617 (LPG), the circumstances under which the Commission's staff is to be permitted access to those records required to be preserved are not clear.

In alluding to this problem the Memorandum of Law in support of plaintiffs Motion (page 5) states that this preservation requirement would be in vain if the Commission's staff were not permitted to inspect those records in the public interest.

This is an assumption of authority not expressed in the law and stated in the broadest possible terms.

I maintain that the Commission has no clearly defined authority to inspect said records in the instances in which the former member has not given his consent in some agreement (such as form BDW).

I have found no statutory authority for such visitations in the Securities and Exchange Act of 1934 and no promulgation of derived authority in the rules of the Commission.

10. In view of the unsupported testimony of Mr. Michael Gregg in all instances (AFFIDAVIT 73 Civil Action File No 2617 (LPG))

a. "I made a number of telephone calls to the offices of Midland." (Item 6).

b. "Mr. Hammarth returned my call and refused to permit inspection of his books and records". (Item 6).

c. "On January 31, 1973, under direction of my Superior I prepared a letter...."etc. (Item 7).

d. "On or about May 17, 1973 I telephoned the offices of Midland to inform him that a court action was to be requested etc." (Item 8).

There is a great deal of question as to what if any violation of any regulation could taken place as Mr. Gregg on his own testimony never used any of the recognized methods of substantiated notice of inspection.

Further by inference from his own testimony Mr. Gregg never made a physical attempt at visitation of the premises of Midland Equity.

11. The careless staff work in Mr. Gregg's Exhibit I leads to further questions regarding his Affidavits, to wit Ref. Memorandum to Files 15 December 1972 (Exhibit I Affidavit of Michael T. Gregg 73 Civil Action File No 2617 (LPG)

a. "He informed me that he was no longer a broker dealer etc".

In fact I have never personally been a registered broker dealer and have never alluded to the firms books as my personal possessions.

b. "I informed him that according to public records he is still registered with the Commission "etc.

I am of course not registered as a broker dealer with the Commission.

RS

c. "it is necessary that he file a withdrawl form"

It is clearly not necessary that I file a withdrawl form.

Mr. Gregg is apparently confused as to whether I am the member or Midland Equity is the member and communicates a confusion that has never been part of my mental processes or speech patterns. What might, if anything, have been said in such a conversation is certainly open to conjecture.

12. Regarding Exhibit 2, Affidavit of Mr. Michael T. Gregg 73 Civil Action File No 2617 (LPG), Mr. Gregg attests that he prepared then a letter. The demand specifies no time for inspection, no place for inspection, and indeed suggests no course of action.

It can hardly serve as the basis for an alleged violation.

13. During this time Midland Equity Corporation was, until the cut off date of 18 October 1972, under the primary jurisdiction of the National Association of Securities Dealers Inc. The Association acknowledged the change of status from Broker-Dealer by imposition of the SIPC cut off and took no further administrative recognizance of Midland Equity after this date.

14. On the occasion of Mr. Robert Green and Mr. George C. Appoldt's visit to the offices of Midland Equity Corporation they were presented with a xerox copy of the communication from the Security Investor Protection Corporation to Midland Equity Corporation along with a copy of the relevant Public Law 91-598 December 30 1970. (See Exhibits 1 and 2).

They allowed as how they would have to take this up with their superiors. They voluntarily withdrew from the offices of Midland Equity Corporation without making any further demand.

Mr. Appoldt and Mr. Green never renewed their demand by any means nor did they advance any theory that would justify such a demand.

The testimony of Mr. Appoldt supports this both by recital and by inference that no further demands were made.

This testimony cannot serve as the basis for an alleged violation.

15. The letter contained in Mr. Gregg's Affidavit as Exhibit 2 demands access to the books and records of Midland Equity Corp. but contains no recognizance of its changed status nor does it cite any authority for such inspection nor does it give any reason for inspection or specify what records it wishes to inspect.

In view of the events having taken place during the visitation of Mr. Green and Mr. Appoldt some recognization of that situation should have been made.

16. On each occasion of violation as alleged by Mr. Gregg and Mr. Appoldt, the possibility for relief either by notice of motion or by injunction would have been present to the same degree if any, it is in this instance. In the instance of the SEC vs. Havener Securities, the Commission publicly boasted of having enjoined the defendants within four hours of the alleged violation.

Anyone who follows the proceedings of the Commission against various firms can do naught but perceive the pattern of waiting until the firm is defunct and the principles long since departed or otherwise occupied, to impose sanctions, often by default.

In this instance, we see relief being sought after the lapse of a great deal of time, through the use of proceedings designed for the most dire

emergencies giving little if any notice and certainly no documentable notice (Ref Mr. Gregg's Affidavit of Notice 73 Civil Action File No 2617 LPG) coupled with faulty service of process and flimsy allegations of violation.

Only one inference can be drawn from such a situation and that is to question the good faith of both the investigator or the Commission in such a proceeding.

17. The temporary restraining order and motion for a preliminary injunction should not have been granted.

a. A proper showing of need has not been made as required in SEC v Bennett, 207 F Supp 919 (DNJ 1962).

b. A prima facie case has not been presented by the Commission as required in SEC v Boren, 293 F 2nd 312 (2nd Cir 1960),

c. The mere fact of a past violation has not been established as contemplated in SEC v General Securities 216 F Supp 350 (SD NY 1963).

d. A "proper showing" has been defined by the United States Court of Appeals for the Seventh Circuit as a "justifiable basis for believing, derived from reasonable inquiry or other credible information, that such a state of facts probably existed as reasonably would lead the Commission to believe the defendants were engaged in violation of the statutes involved". Federal Trade Commission v Rhoades Pharmacal Co. 191 F 2nd 744 747 748 (7th Cir 1951).

There is no evidence that Midland refused a proper inspection as contemplated in Hecht v Bowles 321 US 321 (1944).

Public interest in this case would not be affected by any alleged violations of the Net Capital Rule (Rule 15c3-1, 17 CFR 240.15c3-1 in that it requires a broker dealer to maintain a specified amount of liquid capital while doing business with the investing public as in Blaise D'Antoni Associates v SEC 289 F2nd 276, 277 (5 CA 1961). In this instance the entity must be a broker dealer and must be doing business with the public.

18. Defendant Hammarth has not wilfully aided and abetted violations of Section 17(a) of the Exchange Act, 15 USC 78 g(a) which provides that "Every national securities exchange, every member thereof, every broker or dealer who transacts a business through the medium of any such member, every registered securities association and every broker dealer registered pursuant to this title...."

This section of the Act clearly refers to registered broker dealers.

The registration of Midland Equity Corporation was terminated by the effect of the SIPC cut off. See SIPC letter dated 3 October 1972 and transcript Public Law 91-598 December 30 1970 attached.

The Visitation Provisions of Section 17 (a) of the Exchange Act, 15 USC 78 g (a) (Ref page 3 Memorandum of Law 73 Civil Action File No 2617 (LPG) provide for reasonable periodic, special or other examinations.

Even if Midland's Registration continued in effect, the provisions of reasonableness should have produced some assurance on the part of the representatives of the Commission that no conflict existed, there were no penalties involved and some evidence that Midland's registration continued in effect. This was not the case.

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19. In that Midland Equity Corporation had lost is principle function through the operation of Public Law 91-598 December 30 1970 (SIPC) I delivered the few remaining securities Midland then had custody of for customer accounts (about 10-20 accounts) along with cash balances due and withdrew the remaining liquid assets from the Corporation.

20. In that Midland Equity Corporation was no longer capable of performing in its principle area of operation, had no assets and indeed had become a mere liability for its stockholders, I sought to liquidate the remaining assets as best I could on behalf of the stockholders. I accomplished this on 15 February 1973 and resigned my position as officer and director after the transfer had been accomplished.

21. I am not now, nor have I been since 15 February 1973 an employee, director or principle of Midland Equity Corporation.

22. I have no access to or control over the books and records mentioned in paragraph 10 73 Civil Action File No 2617 (LPG).

23. That in the period in question as substantiated above Midland Equity Corporation was prohibited from engaging in business as a broker or dealer by the provisions of Public Law 91 598 Dec 30 1970 (SIPC). See Exhibits 1 and 2.

24. That I, James J. Hammarth am not now and have not to my knowledge engaged in any of the illegal acts or practices complained of herein.

25. That I would have permitted a lawful inspection of the documents in question if the Commission were to assure me of the circumstances under which it would be proper, the grounds for their jurisdiction and that I was not imperiling myself in a conflict of laws situation.

26. That I would, if I had the documents under my control, permit a lawful, properly instituted inspection of such documents at this time by the Commission.

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27. It is submitted that this Affidavit demonstrates that no clear basis for injunctive relief has been submitted by the Commission.

28. It is further submitted that there is no basis for any relief whatever due the Commission.

29. For the reasons outlined above the defendant James J. Hammarth respectfully requests (demands?) that:

a. the temporary restraining order be terminated.

b. that a preliminary injunction pursuant to rule 65 of the Federal Rules of Civil Procedure should not be granted as requested by the plaintiff Securities and Exchange Commission.

JAMES J. HAMMARTH

Sworn to before me this
3 day of June, 1973.

NOTARY PUBLIC
CHARLES BURNS
NOTARY PUBLIC, State of New York
No. 60-0506130
Qualified in Westchester County
Commission Expires March 30, 19 74

Original filed in Court
21 June
This is a copy
identical to one given
SEC on 3 July

R-P

EXEMPTION OF CERTAIN SECURITIES FROM SECTION 15(a)

Rule 15a–1. Exemption of Individual Notes or Bonds Secured by Lien on Real Estate From Section 15(a)

Evidences of indebtedness secured by mortgage, deed or trust, or other lien upon real estate or upon leasehold interests therein where the entire mortgage, deed of trust, or other lien is transferred with the entire evidence of indebtedness are hereby exempted from the operation of section 15(a) of the Securities Exchange Act of 1934, as amended.

Rule 15a–2. Exemption of Certain Securities of Cooperative Apartment Houses From Section 15(a)

Shares of a corporation which represents ownership, or entitle the holders thereof to possession and occupancy, of specific apartment units in property owned by such corporations and organized and operated on a cooperative basis are hereby exempted from the operation of section 15(a) of the Act, when such shares are sold by or through a real estate broker licensed under the laws of the political subdivision in which the property is located.

Rule 15a–3. Exemption of Specialist's Block Purchases and Sales

Securities registered or exempt from registration on a national securities exchange are hereby exempted from the operation of section 15(a) of the Act when they are bought or sold off the floor of such exchange in a block by a specialist registered in such security and the transaction involving such securities has been approved by such exchange pursuant to its rules to assist the specialist to maintain a fair and orderly market in such security on such exchange.

REGISTRATION OF BROKERS AND DEALERS

Rule 15b1–1. Application for Registration of Broker or Dealer

An application for registration of a broker or dealer, pursuant to section 15(b), shall be filed on Form BD in accordance with the instructions contained therein.

(Formerly Rule 15b–1, renumbered. Release 34–7700, dated Sept. 10, eff. Sept. 24, 1965.)

Rule 15b1–2. Statement of Financial Condition To Be Filed With Application for Registration as a Broker or Dealer

(*a*) Every broker or dealer who files an application for registration on Form BD shall file with such application, in duplicate original, a statement of financial condition in such detail as will disclose the nature and amount of assets and liabilities and the net worth of such broker or dealer (securities of such broker or dealer or in which such broker or dealer has an interest shall be listed in a separate schedule and valued at the market) as of a date within 30 days of the date on which such statement is filed. Attached to such statement shall be an oath or affirmation that such statement is true and correct to the best knowledge and belief of the person making such oath or affirmation. The oath or affirmation shall be made before a person duly authorized to administer such oath or affirmation. If the broker or dealer is a sole proprietorship, the oath or affirmation shall be made by the proprietor; if a partnership, by a general partner; if a corporation, by a duly authorized officer.

(*b*) The schedule of securities furnished as a part of such statement of financial condition shall be deemed confidential if bound separately from the balance of such statement, except that it shall be available for official use by any official or employee of the United States or any State, by national securities exchanges and national securities associations of which the person filing such statement is a member, and by any other person to whom the Commission authorizes disclosure of such information as being in the public interest. Nothing contained in this paragraph shall be deemed to be in derogation of the rules of any

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in any amendment thereto, becomes inaccurate for any reason, the broker or dealer shall promptly file an amendment on Form BD correcting such information.

(c) Every amendment filed pursuant to this rule shall constitute a "report" within the meaning of sections 15(b), 17(a), and 32(a) of the Act.

(Amended Sept. 10, eff. Sept. 15, 1964, Release 34-7430. Formerly Rule 15b-2, renumbered, Release 34-7700, dated Sept. 10, eff. Sept. 24, 1965; amended paras. (a), (b) and (c), Release 34-8317, May 21, eff. Sept. 1, 1968.)

Rule 15b6-1. Withdrawal From Registration

(a) Notice of withdrawal from registration as a broker or dealer pursuant to section 15(b) shall be filed on Form BDW in accordance with the instructions contained therein.

(b) Except as hereinafter provided, a notice to withdraw from registration filed by a broker or dealer pursuant to section 15(b) shall become effective on the 60th day after the filing thereof with the Commission or within such shorter period of time as the Commission may determine. If a notice to withdraw from registration is filed with the Commission at any time subsequent to the date of the issuance of a Commission order instituting proceedings pursuant to section 15(b) to censure, suspend, or revoke the registration of such broker or dealer, or if prior to the effective date of the notice of withdrawal the Commission institutes such a proceeding or a proceeding to impose terms or conditions upon such withdrawal, the notice of withdrawal shall not become effective except at such time and upon such terms and conditions as the Commission deems necessary or appropriate in the public interest or for the protection of investors.

(c) Every notice of withdrawal filed pursuant to this rule shall constitute a "report" within the meaning of sections 15(b) and 17(a) and other applicable provisions of the Act.

(Formerly Rule 15b-6, renumbered, Release 34-7700, dated Sept. 10, eff. Sept. 24, 1965. Amended Apr. 1, eff. May 2, 1966, Release 34-7847.)

Rule 15b7-1. Proceedings Under Sections 15(b), 15 A(l)(2) and 19(a)(3) of the Act

(a) Where the Commission denies or revokes the registration of a broker or dealer pursuant to section 15(b) of the Act or suspends or expels a member of a national securities association or national securities exchange pursuant to section 15A(l)(2) or section 19(a)(3) of the Act, the Commission may determine and announce for purposes of section 15A(b)(4) of the Act whether any person associated with the member, broker or dealer was a cause of the imposition of such sanction; such determination may be made whether or not the member, broker or dealer admits the violation or consents to the imposition of the sanction. In such proceedings the Commission may also make such findings with respect to violation by associates of the member, broker or dealer, as may be relevant to the question of causation for purposes of section 15A(b)(4) or to the issues under sections 15(b), 15A(l)(2) or 19(a)(3).

(b) In proceedings under sections 15(b), 15A(l)(2) or 19(a)(3) of the Act, the Commission will give appropriate notice and opportunity for hearing to the member, broker or dealer concerned and to any person associated with him whose interests may be affected by the proceedings. The member, broker or dealer will be named in the caption of the proceding and shall be deemed a party of record. An associated person who may be aggrieved will not ordinarily be named in the caption of the proceeding but shall be entitled to participate as a party. If he participates generally in the proceeding or files a notice of appearance, he shall be deemed a party of record and will be give notices of intermediate developments in the proceeding. In any event he may inform himself of such developments by attendance at the hearings or examination of the record (whether the proceedings be public or private) or by arrangement with a party of record, so that he can determine whether he desires to be heard at any time. Rule 9 of the Rules of Practice, other than paragraphs (a) and (b) thereof, shall not apply to proceedings under this rule.

(c) The terms "associated person" and "person associated" as used in this rule shall mean a person associated with a member, broker or dealer in any of the capacities specified in sections 15(b) and 15A(b)(4) of the Act.

(d) Unless the Commission otherwise directs, paragraphs (a), (b) and (c) of this rule shall apply only to proceedings instituted prior to August 20, 1964. The terms "associated person" and "person associated" referred to in paragraph (c) shall mean a person associated with a member, broker or dealer in any of the capacities specified in sec-

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SEC. 9. FUNCTIONS OF SELF-REGULATORY ORGANIZATIONS.

(a) COLLECTING AGENT.—Each self-regulatory organization shall act as collection agent for SIPC to collect the assessments payable by all members of SIPC for whom such self-regulatory organization is the examining authority, and members of SIPC who are not members of any self-regulatory organization shall make payment direct to SIPC. An examining authority shall be obligated to remit to SIPC assessments made under section 4 only to the extent that payments of such assessments are received by such examining authority.

(b) IMMUNITY.—No self-regulatory organization shall have any liability to any person for any action taken or omitted in good faith pursuant to section 5(a)(1).

(c) INSPECTIONS.—The self-regulatory organization of which a member of SIPC is a member shall inspect or examine such member for compliance with applicable financial responsibility rules, except that if a member of SIPC is a member of more than one self-regulatory organization, SIPC shall designate one of such self-regulatory organizations to inspect or examine such member of SIPC for compliance with applicable financial responsibility rules. Such self-regulatory organization shall be selected by SIPC on the basis of regulatory procedures employed, availability of staff, convenience of location, and such other factors as SIPC may consider appropriate for the protection of customers of its members.

(d) REPORTS.—There shall be filed with SIPC by the self-regulatory organizations such reports of inspections or examinations of the members of SIPC (or copies thereof) as may be designated by SIPC by bylaw or rule.

(e) CONSULTATION.—SIPC shall consult and cooperate with the self-regulatory organizations toward the end:

(1) that there may be developed and carried into effect procedures reasonably designed to detect approaching financial difficulty upon the part of any member of SIPC;

(2) that, as nearly as may be practicable, examinations to ascertain whether members of SIPC are in compliance with applicable financial responsibility rules will be conducted by the self-regulatory organizations under appropriate standards (both as to method and scope) and reports of such examinations will, where appropriate, be standard in form; and

(3) that, as frequently as may be practicable under the circumstances, each member of SIPC will file financial information with, and be examined by, the self-regulatory organization which is the examining authority for such member.

(f) FINANCIAL CONDITION OF MEMBERS.—Notwithstanding the limitations contained in sections 15A and 19 of the 1934 Act and without limiting its powers under those or other sections of the 1934 Act, the Commission may by such rules or regulations as it determines to be necessary or appropriate in the public interest and to effectuate the purposes of this Act—

(1) require any self-regulatory organization to adopt any specified alteration of or supplement to its rules, practices, and procedures with respect to the frequency and scope of inspections and examinations relating to the financial condition of members of such self-regulatory organization and the selection and qualification of examiners;

84 Stat. 1070; 78 Stat. 574, 43 Stat. 899; 82 Stat. 453. 15 USC 78o-3, 78s.

(3) require any self-regulatory organization to inspect or examine any members of such self-regulatory organization in relation to the financial condition of such members. In the case of a broker or dealer who is a member of more than one self-regulatory organization the Commission, to the extent practicable, shall avoid requiring duplication of examinations, inspections, and reports.

SEC. 10. PROHIBITED ACTS.

(a) FAILURE TO PAY ASSESSMENT, ETC.—If a member of SIPC shall fail to file any report or information required pursuant to this Act, or shall fail to pay when due all or any part of an assessment made upon such member pursuant to this Act, and such failure shall not have been cured, by the filing of such report or information or by the making of such payment, together with interest thereon, within five days after receipt by such member of written notice of such failure given by or on behalf of SIPC, it shall be unlawful for such member, unless specifically authorized by the Commission, to engage in business as a broker or dealer. If such member denies that he owes all or any part of the amount specified in such notice, he may after payment of the full amount so specified commence an action against SIPC in the appropriate United States district court to recover the amount he denies owing.

(b) ENGAGING IN BUSINESS AFTER APPOINTMENT OF TRUSTEE.—It shall be unlawful for any broker or dealer for whom a trustee has been appointed pursuant to this Act to engage thereafter in business as a broker or dealer, unless the Commission otherwise determines in the public interest. The Commission may by order bar or suspend for any period, any officer, director, general partner, owner of 10 per centum or more of the voting securities, or controlling person of any broker or dealer for whom a trustee has been appointed pursuant to this Act from being or becoming associated with a broker or dealer, if after appropriate notice and opportunity for hearing, the Commission shall determine such bar or suspension to be in the public interest.

(c) EMBEZZLEMENT, ETC., OF ASSETS OF SIPC.—Whoever steals, unlawfully abstracts, unlawfully and willfully converts to his own use or to the use of another, or embezzles any of the moneys, securities, or other assets of SIPC shall be fined not more than $50,000 or imprisoned not more than five years or both.

SEC. 11. MISCELLANEOUS PROVISIONS.

(a) PUBLIC INSPECTION OF REPORTS.—Any notice, report, or other document filed with SIPC pursuant to this Act shall be available for public inspection unless SIPC or the Commission shall determine that disclosure thereof is not in the public interest. Nothing herein shall act to deny documents or information to the Congress of the United States or the committees of either House having jurisdiction over financial institutions, securities regulation, or related matters under the rules of each body. Nor shall the Commission be denied any document or information which the Commission, in its judgment, needs.

(b) APPLICATION OF ACT TO FOREIGN MEMBERS.—Except as otherwise provided by rule or regulation of the Commission, if the head office of a member is located, and the member's principal business is conducted, outside the United States, the provisions of this Act shall apply to such member only in respect of the business of such member conducted in the United States.

(c) LIABILITY OF MEMBERS OF SIPC.—Except for such assessments

prices, and Commission was informed of contemplated stabilization transactions. Securities and Exchange Commission v. Otis & Co., D.C.Ohio 1936, 18 F.Supp. 100.

Commission was entitled to injunction to restrain dealer from using instrumentalities of interstate commerce for sale of securities without disclosing facts in violation of subsection (a) (2) of section 77q of this title, where evidence showed that dealer had sold block of stock without disclosing to customers agreement with dealer's vendors whereby 17,000 out of 60,000 shares were to be withheld from market for 60-day period. Id.

18. —— Clean hands

Alleged violation of this chapter by corporate plaintiff did not call for application of clean hands doctrine against injunctive relief where in any event individual plaintiffs were not guilty of wrongdoing and where allowance of such defense would leave stockholders of one corporation unprotected as against alleged misleading by both other corporations engaged in proxy contest. Union Pac. R. Co. v. Chicago & N. W. Ry. Co., D.C.Ill.1964, 226 F.Supp. 400.

19. —— Violation of

Stockholder, having been explicitly warned by Commission not to send other stockholders a particular letter containing misleading statements concerning operations of registered holding company, could not escape liability for violating injunction against publication of such statements on ground that violation was induced by Commission in that Commission had not objected to same statements, except the words "in my opinion", contained in a previous letter and quoted words, were inserted at suggestion of Commission's staff. Securities and Exchange Commission v. Okin, C.C.A.N.Y.1943, 137 F.2d 862, 148 A.L.R. 1019.

Where minority stockholder's letter stated that he desired to bring about the removal of eight named directors but was silent regarding ninth director although the ninth director had stated that he would refuse to serve on the board with the minority stockholder, the failure of the letter to disclose the present intention of the ninth director did not constitute violation of interlocutory injunction restraining publication of false and misleading statements. Id.

20. Persons liable

Action would not be maintained against Chairman of Commission and its employees for damage allegedly resulting to plaintiff's business from acts of defendants fully within scope and course of carrying out their official duties in investigating plaintiff's business. Holmes v. Eddy, C.A.N.C.1965, 341 F.2d 477, certiorari denied 86 S.Ct. 185, 382 U.S. 892, 15 L.Ed.2d 149, rehearing denied 86 S.Ct. 881, 383 U.S. 922, 15 L.Ed.2d 678.

Where drawings of automobile and tire which plaintiffs were developing were shown only to Commission and engineers not adverse to plaintiffs' interests and qualified to give expert opinion in action against plaintiffs pertaining to plaintiffs' sale of stock, plaintiffs were not entitled to recover from Commission as agents on ground of unlawful interference by disclosure of confidential information. Id.

Although wife of director of investment company was not director or officer of company at time of trial, but violations of Securities Exchange Act of 1933, section 77a et seq. of this title, this chapter, and Investment Company Act of 1940, section 80a-1 et seq. of this title, had occurred, and it seemed reasonable that wife would again become director of a registered investment company, director, his wife, investment company and another corporation with substantially same officers and directors as investment company would be enjoined from further violations. Securities and Exchange Commission v. Midland Basic, Inc., D.C.S.D. 1968, 283 F.Supp. 609.

21. Contempt

Stockholder's admission that corporation did not in fact lose money in operating certain subsidiaries, except in sense that capital could be invested more profitably elsewhere, established that his opinion expressed in letters to other stockholders that such operations resulted in substantial losses to corporation was groundless so as to warrant adjudging him guilty of contempt for violating injunction against publication of false and misleading statements. Securities and Exchange Commission v. Okin, C.C.A.N.Y. 1943, 137 F.2d 862, 148 A.L.R. 1019.

The capitalization of part of Commission's order in quoting it in stockholder's letter to other stockholders of registered holding company was not so misleading as to warrant holding stockholder guilty of contempt for violating injunction against publication of false or misleading statements. Id.

23. —— Purging of

A stockholder adjudged guilty of contempt for violating injunction against

publication of false or misleading statements should be permitted to purge himself of contempt by filing a list of stockholders to whom letter containing false or misleading statement was sent and mailing to such stockholders a correction of statement in a form to be approved by court, or by depositing with court security for cost of correction to be made by Commission. Securities and Exchange Commission v. Okin, C.C.A.N.Y.1943, 137 F.2d 862, 148 A.L.R. 1019.

23. —— Fine

A stockholder adjudged guilty of contempt for sending letters containing false or misleading statements to approximately 6,000 other stockholders was improperly required to pay a fine in the amount of estimated cost of printing and mailing 100,000 copies of order and explanatory statement, though reserved the right to apply for remission of so much of fine as should exceed expense of required printing and mailing. Securities and Exchange Commission v. Okin, C.C.A.N.Y.1943, 137 F.2d 862, 148 A.L.R. 1019.

24. Remedies of dealer

The remedy of securities dealer claiming that examiner for Commission was making unreasonable demands for dealer's records lay in refusing compliance with unlawful demands, and compliance with demands could be enforced only by application to district court under this section authorizing proceeding. Guaranty Underwriters v. Johnson, C.C.A.Fla.1943, 133 F.2d 84.

25. Materiality of questions

Questions directed to witness at investigation directed by formal order of Commission to determine whether transaction which appeared on books of firm of which defendant was head was actual and bona fide or fictitious were material to inquiry and inquiry was within power of Commission. U. S. v. Batton, D.C.D.C.1964, 226 F.Supp. 492, certiorari denied 85 S.Ct. 898, 380 U.S. 912, 13 L.Ed.2d 799, rehearing denied 85 S.Ct. 1557, 381 U.S. 930, 14 L.Ed.2d 688.

26. Privileged communications

In proceeding by Commission investigating common stock offering by corporation whose contract with underwriter required that no material legal proceedings be pending against corporation on certain date, prima facie showing of fraud to pierce attorney-client privilege and relieve communications between underwriter and its attorney from immunity was not made, where circumstantial facts proved were reasonably consistent with underwriter's inquiries to attorney as to whether suit against corporation had been or would be filed, as with actually seeking to induce filing of such suit. Securities and Exchange Commission v. Harrison, D.C.D.C. 1948, 80 F.Supp. 226, appeal dismissed 184 F.2d 691.

27. Discretion of court

Denial of preliminary injunction restraining violations of registration and sections 77e, 77q and 78j of this title by employee of brokerage firm who had left stock brokerage business was not abuse of discretion. Securities and Exchange Commission v. Pearson, C.A.Okl.1970, 426 F.2d 1339.

In proceeding to enjoin violations of federal securities legislation and to appoint a receiver for corporate defendants, matters relating to requiring defendants to attend a night session and refusing to grant a stay of the taking over by the appointed receiver were entirely within trial judge's discretion. Los Angeles Trust Deed & Mortg. Exchange v. Securities and Exchange Commission, C.A.Cal.1960, 285 F.2d 162, certiorari denied 81 S.Ct. 1095, 366 U.S. 919, 6 L.Ed.2d 241.

28. Transcript of testimony

Denial to defendants of copies of testimony given by them during investigation carried on upon instructions from Commission by one of its representatives was not deprivation of due process, and if a defendant considered that answering questions while testifying violated his constitutional right, it was incumbent upon him at the time to assert his privilege. Securities and Exchange Commission v. Torr, D.C.N.Y.1936, 15 F.Supp. 144.

29. Disqualification of judge

In action to restrain corporate defendants from violating federal securities legislation and to appoint a receiver for defendants, affidavits by defendants with respect to trial court's actions did not disclose such bias as would require judge to disqualify himself. Los Angeles Trust Deed & Mortg. Exchange v. Securities and Exchange Commission, C.A.Cal.1960, 285 F.2d 162, certiorari denied 81 S.Ct. 1095, 366 U.S. 919, 6 L.Ed.2d 241.

30. Jurisdiction

Federal courts had jurisdiction, on due process grounds, to entertain registrants' action to enjoin Commission from prosecution revocation proceeding, on allegations that person who had participated in investigation or prosecution had later, as member of Commission, participated in

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which it was alleged that salesman employed by brokers had improperly handled customer's account presented no facts in brief or by affidavit to show that they acted in good faith by taking precautionary measures to prevent injury suffered, it was presumed for purpose of deciding their motion to dismiss or, in the alternative, for summary judgment that requirements of good faith did not exist although if they had existed they would merely have raised question of fact to be determined at trial. Lorenz v. Watson, D.C.Pa. 1960, 258 F.Supp. 724.

10. Evidence

Evidence sustained finding that adequate internal supervision by brokerage firm would have prevented loss to customer arising from representative's conversion of two particular issues of customer's securities to representative's own use through fraud and deceit. Hecht v. Harris, Upham & Co., C.A.Cal.1970, 430 F.2d 1202.

11. Findings

Finding of district court that defendant brokerage firm representative being sued by customer for damages arising out of the handling of her account did not frankly and fairly explain basic considerations which would have indicated amount of trading actually going on was not clearly erroneous. Hecht v. Harris, Upham & Co., C.A.Cal.1970, 430 F.2d 1202.

§ 78u. Investigations; injunctions and prosecution of offenses

(a) The Commission may, in its discretion, make such investigations as it deems necessary to determine whether any person has violated or is about to violate any provision of this chapter or any rule or regulation thereunder, and may require or permit any person to file with it a statement in writing, under oath or otherwise as the Commission shall determine, as to all the facts and circumstances concerning the matter to be investigated. The Commission is authorized in its discretion, to publish information concerning any such violations, and to investigate any facts, conditions, practices, or matters which it may deem necessary or proper to aid in the enforcement of the provisions of this chapter, in the prescribing of rules and regulations thereunder, or in securing information to serve as a basis for recommending further legislation concerning the matters to which this chapter relates.

(b) For the purpose of any such investigation, or any other proceeding under this chapter, any member of the Commission or any officer designated by it is empowered to administer oaths and affirmations, subpena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records which the Commission deems relevant or material to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in the United States or any State at any designated place of hearing.

(c) In case of contumacy by, or refusal to obey a subpena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records. And such court may issue an order re-

quiring such person to appear before the Commission officer designated by the Commission, there to produce so ordered, or to give testimony touching the matter under tion or in question; and any failure to obey such order of the may be punished by such court as a contempt thereof. All pro in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found. Any person who shall, without just cause, fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, and other records, if in his power so to do, in obedience to the subpena of the Commission, shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine of not more than $1,000 or to imprisonment for a term of not more than one year, or both.

(d) Repealed. Pub.L. 91–452, Title II, § 212, Oct. 15, 1970, 84 Stat. 929.

(e) Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule or regulation thereunder, it may in its discretion bring an action in the proper district court of the United States or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who may, in his discretion, institute the necessary criminal proceedings under this chapter.

(f) Upon application of the Commission the district courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States, shall also have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this chapter or any order of the Commission made in pursuance thereof or with any undertaking contained in a registration statement as provided in subsection (d) of section 78o of this title.

June 6, 1934, c. 404, § 21, 48 Stat. 899; May 27, 1936, c. 462, § 7, 49 Stat. 1379; June 25, 1936, c. 804, 49 Stat. 1921; June 25, 1948, c. 646, § 32(b), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107; Oct. 15, 1970, Pub.L. 91–452, Title II, § 212, 84 Stat. 929.

Historical Note

References in Text. This chapter, referred to in subsecs. (a), (b), (e) and (f), is the original read "This Act." See codification note under section 78a of this title.

Codification. The words "the district court of the United States for the District of Columbia" following "district court of the United States" in subsec. (e) and "district courts of the United States" in

(b) Immunity.—No self-regulatory organization shall have liability to any person for any action taken or omitted in good pursuant to section 78eee(a) (1) of this title.

(c) Inspections.—The self-regulatory organization of whic member of SIPC is a member shall inspect or examine such me for compliance with applicable financial responsibility rules, e that if a member of SIPC is a member of more than one self-regula organization, SIPC shall designate one of such self-regulatory or zations to inspect or examine such member of SIPC for compli with applicable financial responsibility rules. Such self-regula organization shall be selected by SIPC on the basis of regulatory cedures employed, availability of staff, convenience of location, such other factors as SIPC may consider appropriate for the pr tion of customers of its members.

(d) Reports.—There shall be filed with SIPC by the self-re tory organizations such reports of inspections or examinations o members of SIPC (or copies thereof) as may be designated by by bylaw or rule.

(e) Consultation.—SIPC shall consult and cooperate with the regulatory organizations toward the end:

(1) that there may be developed and carried into effect cedures reasonably designed to detect approaching financial culty upon the part of any member of SIPC;

(2) that, as nearly as may be practicable, examinations certain whether members of SIPC are in compliance with cable financial responsibility rules will be conducted by the regulatory organizations under appropriate standards (both method and scope) and reports of such examinations will, appropriate, be standard in form; and

(3) that, as frequently as may be practicable under th cumstances, each member of SIPC will file financial inform with, and be examined by, the self-regulatory organization is the examining authority for such member.

(f) Financial condition of members.—Notwithstanding the l tions contained in sections 15A and 19 of the 1934 Act and w limiting its powers under those or other sections of the 1934 A Commission may by such rules or regulations as it determines necessary or appropriate in the public interest and to effectua purposes of this chapter—

(1) require any self-regulatory organization to adopt any fied alteration of or supplement to its rules, practices, an cedures with respect to the frequency and scope of inspectio examinations relating to the financial condition of memb such self-regulatory organization and the selection and qua tion of examiners;

(2) require any self-regulatory organization to furnish SIPC and the Commission with reports and records or copies thereof relating to the financial condition of members of such self-regulatory organization; and

(3) require any self-regulatory organization to inspect or examine any members of such self-regulatory organization in relation to the financial condition of such members. In the case of a broker or dealer who is a member of more than one self-regulatory organization the Commission, to the extent practicable, shall avoid requiring duplication of examinations, inspections, and reports.

Pub.L. 91–598, § 9, Dec. 30, 1970, 84 Stat. 1654.

Historical Note

References in Text. The 1934 Act, referred to in subsec. (f), as meaning the Securities Exchange Act of 1934 (which is classified to section 78a et seq. of this title), see section 78bbb of this title and note under such section.

Sections 15A and 19 of the 1934 Act, referred to in subsec. (f), are classified to sections 78o–3 and 78s of this title.

Legislative History. For legislative history and purpose of Pub.L. 91–598, see 1970 U.S.Code Cong. and Adm.News, p. 5254.

§ 78jjj. Prohibited acts

(a) **Failure to pay assessment, etc.**—If a member of SIPC shall fail to file any report or information required pursuant to this chapter, or shall fail to pay when due all or any part of an assessment made upon such member pursuant to this chapter, and such failure shall not have been cured, by the filing of such report or information or by the making of such payment, together with interest thereon, within five days after receipt by such member of written notice of such failure given by or on behalf of SIPC, it shall be unlawful for such member, unless specifically authorized by the Commission, to engage in business as a broker or dealer. If such member denies that he owes all or any part of the amount specified in such notice, he may after payment of the full amount so specified commence an action against SIPC in the appropriate United States district court to recover the amount he denies owing.

(b) **Engaging in business after appointment of trustee.**—It shall be unlawful for any broker or dealer for whom a trustee has been appointed pursuant to this chapter to engage thereafter in business as a broker or dealer, unless the Commission otherwise determines in the public interest. The Commission may by order bar or suspend for any period, any officer, director, general partner, owner of 10 per centum or more of the voting securities, or controlling person of any broker or dealer for whom a trustee has been appointed pursuant to this chapter from being or becoming associated with a broker or dealer, if after appropriate notice and opportunity for hearing, the Commission shall determine such bar or suspension to be in the public interest.

REF 18 15

January 31, 1973

Midland Equity Corporation
160 Broadway
New York, New York 10038

Attn: Mr. James Joseph Hammarth, President

Dear Mr. Hammarth:

The purpose of this letter is to renew this office's demand for access to the books and records of Midland Equity Corporation. This demand is made pursuant to inspection power granted to staff members of the Securities and Exchange Commission by the federal securities laws.

You are hereby advised that serious consequences can and will flow from your further refusal to cooperate with this office. The attorney assigned to this matter is Michael T. Cregg (264-1692)

Very truly yours,

WILLIAM D. MORAN
Acting Regional Administrator

By:

Thomas R. Beirne
Chief Attorney, Br. #3

cc.:
James Joseph Hammarth
52 Clark Street
Brooklyn, New York 11201

MTG:pm

Ref
16

stitution or laws of the state.[3] He has no right, under the guise of protecting the interest of his client, to depart from the well-established rules of practice in order unnecessarily to insult, scandalize, and otherwise impugn the honor and integrity of the court.[3] The Canons of Professional Ethics of the American Bar Association undertake to codify the traditions and practice recognized over the centuries as part of the common law with respect to the lawyer's obligations. They are as obligatory on him when adopted by rule of court as if cast in statutory form.[4]

§ 5. — Public versus private duties.

An attorney at law has both public and private obligations, because he is sworn to act with all good fidelity toward both his client and the court.[5] His private obligations comprise those duties which he owes to his client;[6] his public duty consists of his obligation to aid the administration of justice,[7] to uphold the dignity of the court and respect its authority,[8] and to co-operate with it whenever justice would otherwise be imperiled.[9] Where his duties to his client conflict with those he owes to the public as an officer of the court in the administration of justice, the former must yield to the latter.[10] He violates his oath of office when he resorts to deception or allows his client to do so.[11]

§ 6. Necessity that litigant appear by counsel.

The right of a litigant to appear by attorney does not make that method of appearance obligatory. A party to an action may appear in his own proper person or by attorney,[12] unless the party is a corporation, in which case it may

Annotation: 31 ALR 1185.

It is the special duty and obligation of members of the bar to protect the good name of the courts against ill-founded and unwarranted attacks. Re Breen, 30 Nev 164, 93 P 997.

2. Gould v State, 99 Fla 662, 127 So 309, 69 ALR 699.

3. Huggins v Field, 196 Ky 501, 244 SW 903, 29 ALR 1268; Re Mindes, 88 NJL 117, 95 A 743.

4. Re Rothman, 12 NJ 528, 97 A2d 621, 39 ALR2d 1032.

For canons of American Bar Association, see Am Jur 2d Desk Book, Document 91.

5. Berman v Coakley, 243 Mass 348, 137 NE 667, 26 ALR 92; Langen v Borkowski, 188 Wis 277, 206 NW 181, 43 ALR 622.

6. §§ 93 et seq., infra.

7. Berman v Coakley, 243 Mass 348, 137 NE 667, 26 ALR 92; Langen v Borkowski, 188 Wis 277, 206 NW 181, 43 ALR 622.

8. Fisher v Pace, 336 US 155, 93 L ed 569, 69 S Ct 425, reh den 336 US 928, 93 L ed 1089, 69 S Ct 653; Huggins v Field, 196 Ky 501, 244 SW 903, 29 ALR 1268.

9. People ex rel. Karlin v Culkin, 248 NY 465, 162 NE 487, 60 ALR 851.

10. Langen v Borkowski, 188 Wis 277, 206 NW 181, 43 ALR 622.

11. Kloss v State, 95 Fla 433, 116 So 39; People v Beattie, 137 Ill 553, 27 NE 1096.

There is nothing in the duty of diligence which a lawyer owes to his client that in any way makes it necessary under any circumstances for him to practice, or attempt to practice, a fraud on the court or to swear to that which is not true. People ex rel. Chicago Bar Asso. v Martin, 288 Ill 615, 124 NE 340, 14 ALR 854.

An attorney must enter into no unlawful conspiracy that might have a tendency either to frustrate the administration of justice or to obtain for his client something he is not justly and fairly entitled to. Langen v Borkowski, 188 Wis 277, 206 NW 181, 43 ALR 622.

12. Osborn v Bank of United States, 9 Wheat (US) 738, 6 L ed 204; Funded Debt Comrs. v Younger, 29 Cal 147; Abernethy v Burns, 206 NC 370, 173 SE 899.

A litigant has a right to act as his own attorney, but if he does so, he should be restricted to the same rules of evidence and procedure as those qualified to practice law; otherwise ignorance is unjustifiably rewarded. Hence the fact that a layman elects to represent himself does not excuse him from a failure to prove his cause of action. Lombardi v Citizens Nat. Trust & Sav. Bank, 137 Cal App 2d 289, 290 P2d 823.

appear only by attorney.[13] But it has been held that a party to a civil action appearing pro se is not entitled, as a matter of right, to be represented by counsel at the same time.[14] And a layman who appears by counsel has no right to personally conduct, or assist counsel in conducting, the litigation.[15]

Where the litigant is an attorney, some courts have permitted him to participate in a trial even though he is represented by other counsel.[16] Others, however, have refused to permit an attorney-litigant to assist his trial counsel.[17]

§ 7. Integrated bar.

Many jurisdictions have organized the lawyers of the state into an integrated bar. This means that all practicing attorneys in the state are required to be members of the state bar, that they are subject to the rules of the bar, including provisions for the payment of an annual fee to administer the purposes of the integrated bar, and that they are required to adhere to a code of ethics and are subject to disciplinary proceedings for infractions of the code.[18] Whether created by or pursuant to statutes or by court rules, integrated bars have common characteristics of being organized by or under the direction of the state, and of being under its direct control; and in effect such bars are governmental bodies.[19] In some cases, the creation of an integrated bar has resulted directly[20] or indirectly from legislation.[1] In other instances, the integrated bar has resulted from the adoption of rules by the supreme court of the state.[2]

13. Osborn v Bank of United States, supra.

14. Brasier v Jeary (CA8 Neb) 256 F2d 474, 67 ALR2d 1096, cert den 358 US 867, 3 L ed 2d 99, 79 S Ct 97, reh den 358 US 923, 3 L ed 2d 242, 79 S Ct 286.

15. Funded Debt Comrs. v Younger, 29 Cal 147; Abernethy v Burns, 206 NC 370, 173 SE 899.

If after the trial begins the litigant insists upon personally examining witnesses, he may be required to continue with the trial by himself. People v Northcott, 209 Cal 639, 289 P 634, 70 ALR 806.

Annotation: 67 ALR2d 1104, §§ 2, 3.

16. Scott v Times-Mirror Co. 181 Cal 345, 184 P 672, 12 ALR 1007.

17. Carter v Holt, 28 Cal App 796, 154 P 37.

Annotation: 67 ALR2d 1109, § 4.

18. Proponents of an integrated bar claim that it is fair and equitable to provide that all lawyers help to meet the expense of carrying on the activities of the bar, and that the integrated bar provides the only efficient method of handling questions of legal ethics and enforcing discipline. Annotation: 114 ALR 161, s. 151 ALR 617.

In Martinez v State (Tex Crim) 318 SW 2d 66, a first degree murder case, the court-appointed attorney for the defendant had been suspended from practice for nonpayment of dues to the integrated bar and, although evidence of guilt seemed clear, the appellate court reversed, holding that the defendant did not have a duly qualified practicing attorney to represent him at the trial, and holding further that any other decision would nullify the entire state bar act.

19. *Annotation:* 114 ALR 161, s. 151 ALR 617.

20. Hinds v State Bar of California, 19 Cal 2d 87, 119 P2d 134 (holding state bar act not unconstitutional as attempt by legislature to delegate judicial powers to board of governors of state bar); Hill v State Bar of California, 14 Cal 2d 732, 97 P2d 236 (holding act valid as regulatory measure under police power); Re Edwards, 45 Idaho 676, 266 P 665; Re Platz, 60 Nev 296, 108 P2d 858; Re Gibson, 35 NM 550, 4 P2d 43.

1. Dreidel v Louisville, 268 Ky 659, 105 SW2d 807 (holding that bar act provides law for creation of board to determine eligibility of attorneys and to fix standards concerning their conduct as lawyers and their conduct in practice of their profession); Integration of Bar Case, 244 Wis 8, 11 NW2d 604, 151 ALR 586, reh den 244 Wis 56, 12 NW2d 699.

Annotation: 114 ALR 161, s. 151 ALR 617.

2. Re Integration of State Bar of Oklahoma, 185 Okla 505, 95 P2d 113.

The power of the supreme court of a state to integrate the state bar has been recognized in several decisions. Re Mundy, 202 La 41, 11 So 2d 398; Re Integration of Bar of Minnesota, 216 Minn 195, 12 NW2d 515; State ex rel. Johnson v Childe, 139 Neb 91, 295 NW 381.

the very time of the transaction in question.[2] For example, where the attorney is acting for several clients at the same time and in the same business, as when he represents both a vendor and a purchaser[3] or a mortgagor and a mortgagee,[4] knowledge which he acquires in the transaction may be imputed to all.[5] It has been held, however, that knowledge of an attorney will not be imputed to a client where the attorney is employed for a limited special purpose only,[6] or where it is distinctly in the interest of one client to conceal knowledge from the other.[7]

§ 110. Professional negligence or incompetency of attorney.

Professional negligence, unskilfulness, or incompetency of counsel is imputed to his client, who is bound thereby, under the rule that the acts and omissions of an attorney acting within the scope of his authority are regarded as the acts of the person he represents.[8] Thus, the court will not in most situations relieve a party against the fault or negligence of his attorney.[9] This is particularly true if the client is also negligent and, by diligence, he might have avoided the consequences of his attorney's negligence.[10] The rule applies in criminal, as well as in civil, cases.[11]

§ 111. Acts of attorney in own interest or in fraud of client.

Where the attorney is acting in his own interest or in fraud of his client, there is an exception to the general rule that knowledge of an attorney is imputable to his client,[12] since it is almost certain that the attorney will then

2. Wittenbrock v Parker, 102 Cal 93, 36 P 374; Constant v University of Rochester, 111 NY 604, 19 NE 631.
Annotation: 4 ALR 1610, s. 38 ALR 822.

3. Hess v Conway, 92 Kan 787, 142 P 253, 4 ALR 1380, reh den 93 Kan 246, 144 P 205, 4 ALR 1587, affd 241 US 624, 60 L ed 1211, 36 S Ct 681; Melms v Pabst Brewing Co. 93 Wis 153, 66 NW 518.
Annotation: 4 ALR 1612, s. 38 ALR 823.

4. Pyeatt v Estus, 72 Okla 160, 179 P 42, 4 ALR 1570.
Annotation: 4 ALR 1612, s. 38 ALR 823.

5. Puffer v Badley, 92 Or 360, 181 P 1, 4 ALR 1561.
Annotation: 4 ALR 1612, s. 38 ALR 823.

6. Puffer v Badley, supra.

7. Florence v De Beaumont, 101 Wash 356, 172 P 340, 4 ALR 1565.

8. Wheiles v Aetna L. Ins. Co. (CA5 Tex) 68 F2d 99; Alger v Beasley, 180 Ark 46, 20 SW2d 317; Griffith v Investment Co. 92 Fla 781, 110 So 271; Sayre v Com. 194 Ky 338, 238 SW 737, 24 ALR 1017; Dumas v Hartford Acci. & Indem. Co. 94 NH 484, 56 A2d 57; Mosher v Mutual Home & Sav. Asso. (App) 35 Ohio L Abs 445, 41 NE2d 871 (neglect of attorney is equivalent to neglect of client); Bowles v Creason, 159 Or 129, 78 P2d 324; Texas Employers Ins. Asso. v Wermske, 162 Tex 540, 349 SW2d 90 (negligence of attorney employed to prosecute workmen's compensation claim).

Where an attorney knew, or had reasonable grounds for believing, that property attached and sold under an attachment after judgment did not belong to the judgment debtor, but to the debtor's wife, the client is chargeable with notice of the wife's title. Atlantic Co. v Farris, 62 Ga App 212, 8 SE2d 665.

9. Putnam v Day, 22 Wall (US) 60, 22 L ed 764; Beth v Harris, 208 Ark 903, 188 SW2d 119; Bunnell v Holmes, 64 Colo 345, 171 P 365; Spaulding v Thompson, 12 Ind 477; Beale v Swasey, 106 Me 35, 75 A 134; Drinkard v Ingram, 21 Tex 650.

The rule has been applied where an attorney failed to bring suit within the statutory period allowed. Beale v Swasey, 106 Me 35, 75 A 134.

Client is not liable for damages alleged to have been caused by his attorney's assault on a third party while the third party and the attorney were engaged in taking depositions. Pyle v Ely & Walker Dry Goods Co. (CA5 Miss) 179 F2d 677.

10. Hallock v New England Tel. & Tel. Co. 95 Vt 273, 115 A 143, 18 ALR 5[illegible].

11. Sayre v Commonwealth, 194 Ky 338, 238 SW 737, 24 ALR 1017.
Annotation: 24 ALR 1025, s. 64 ALR 436.

12. Scotch Lumber Co. v Sage, 132 Ala 598, 32 So 607; Farnsworth v Hazelett, 197 Iowa 1367, 199 NW 410, 38 ALR 814; Fairfield Sav. Bank v Chase, 72 Me 226; Florence v De Beaumont, 101 Wash 356, 172 P 340, 4 ALR 1565.

conceal the fraud or wrong.[13] However, knowledge of the attorney will be imputed to the client despite the attorney's fraud insofar as third parties who had no knowledge of or connection with the fraud are concerned.[14] Thus, a creditor who is induced to enter into a composition agreement through the fraudulent representation of the debtor's attorney may have the agreement set aside even though the debtor was entirely unaware of the misconduct of his attorney.[15]

3. Court Appearances

§ 112. Express or implied authority necessary.

No person has the right to appear as another's attorney without the other's authority, whether the other is a natural person or a corporation.[16] The authority may be express or implied, and the authority may be given by an agent of the party for whom the appearance is made.[17] Employment in a principal case does not authorize an attorney to appear in other proceedings not forming an essential part of that case.[18]

§ 113. Presumption of authority.

It is said that there is a strong presumption that an attorney who files a suit does so with the authority of his client.[19] And the entry of appearance by an attorney is itself presumptive evidence of his authority to represent the person for whom he appears.[20] The presumption is rebuttable,[1] but the appearance of an attorney for one of the parties is generally deemed sufficient proof of his authority for the opposite party and for the court.[2]

§ 114. Challenge of authority—who may make.

It is said that the question of an attorney's authority to represent an alleged client can only be raised on a motion directly made for that purpose, supported by affidavits.[3]

The authority of an attorney to appear may be challenged by the party whom the attorney assumes to represent,[4] or by the opposite party if his rights will

Annotation: 4 ALR 1618, 1619, s. 38 ALR 824.

13. Meims v Pabst Brewing Co. 93 Wis 153, 66 NW 518.

14. Armstrong v Ashley, 204 US 272, 51 L ed 482, 27 S Ct 270.

15. Bank of Commerce v Hoeber, 88 Mo 37.

16. Santa Rosa v Fall, 273 US 315, 71 L ed 658, 47 S Ct 361.

17. Hirsch Bros. & Co. v R. E. Kennington Co. 155 Miss 242, 124 So 344, 88 ALR 1.

Practice Aids.—Stipulations granting attorney express authority as to particular matters. 1 Am Jur Legal Forms, 1:1848–1:1866.

18. Hollan v Kepner, 297 Ill 332, 130 NE 699.

19. Waltzinger v Birsner, 212 Md 107, 128 A2d 617.

20. Hill v Mendenhall, 21 Wall (US) 453, 22 L ed 616; Bowles v [illegible] Brewery (CA4 Md) 146 F2d 842; W[illegible] v Ring, 312 Ill 544, 144 NE 333, 36 ALR 520; Gatewood v Board of Comrs. 119 Ind App 297, 86 NE2d 298; Waltzinger v Birsner, 212 Md 107, 128 A2d 617; Corbitt v Timmerman, 95 Mich 581, 55 NW 437; State ex rel. Coleman v District Ct. 120 Mont 372, 186 P2d 91.

Annotation: 88 ALR 15.

1. Great West Min. Co. v Woodmas of Alston Min. Co. 12 Colo 46, 20 P 771; Anderson v Crawford, 147 Ga 455, 94 SE 574; York Harbor Village Corp. v Libby, 126 Me 537, 140 A 382.

2. Osborn v Bank of United States, 9 Wheat (US) 738, 6 L ed 204; Tally v Reynolds, 1 Ark 99; Penobscot Boom Corp. v Lamson, 16 Me 224.

3. Charleston v Littlepage, 73 W Va 156, 80 SE 131.

Practice Aids.—2 Am Jur Pl & Pr Forms, 2:1171–2:1175.

4. Miller v Continental Assur. Co. 233 Mo 91, 134 SW 1003.

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
REGIONAL OFFICE
26 FEDERAL PLAZA
NEW YORK, N.Y. 10007

IN REPLYING PLEASE QUOTE
NY-E:MTG

May 3, 1974

Mr. James Joseph Hammarth
21 Davenport Avenue
New Rochelle, New York 10805

Re: SEC v. JamesJoseph Hammarth, Docket No. 74-1510 (T-3261)

Dear Mr. Hammarth:

I have been requested to inform you that Prof. Nathaniel Fensterstock, Staff Counsel, United States Court of Appeals, Second Circuit, has scheduled a pre-appeal conference for Tuesday, May 14, 1974 at 4:30 p.m. in Room 1804 of the United States Courthouse, Foley Square, New York, New York 10007.

You are, of course, permitted to attend with counsel if you desire but, in any event, your own attendance is required.

Very truly yours,

WILLIAM D. MORAN
Regional Administrator

by Thomas R. Beirne
Thomas R. Beirne
Chief Attorney, Br. #3

cc:
Martin Berglas, Esq.
Office of General Counsel

P-8 Ref 19

reproduced in a manner authorized by this rule may be inserted in the appendix; such pages may be informally renumbered if necessary.

If briefs are produced by commercial printing or duplicating firms, or, if produced otherwise and the covers to be described are available, the cover of the brief of the appellant should be blue; that of the appellee, red; that of an intervenor or amicus curiae, green; that of any reply brief, gray. The cover of the appendix, if separately printed, should be white. The front covers of the briefs and of appendices, if separately printed, shall contain: (1) the name of the court and the number of the case; (2) the title of the case (see Rule 12(a)); (3) the nature of the proceeding in the court (e. g., Appeal; Petition for Review) and the name of the court, agency, or board below; (4) the title of the document (e. g., Brief for Appellant, Appendix); and (5) the names and addresses of counsel representing the party on whose behalf the document is filed.

(b) Form of Other Papers. Petitions for rehearing shall be produced in a manner prescribed by subdivision (a). Motions and other papers may be produced in like manner, or they may be typewritten upon opaque, unglazed paper 8½ by 11 inches in size. Lines of typewritten text shall be double spaced. Consecutive sheets shall be attached at the left margin. Carbon copies may be used for filing and service if they are legible.

A motion or other paper addressed to the court shall contain a caption setting forth the name of the court, the title of the case, the file number, and a brief descriptive title indicating the purpose of the paper.

Notes of Advisory Committee on Appellate Rules

Only two methods of printing are now generally recognized by the circuits—standard typographic printing and the offset duplicating process (multilith). A third, mimeographing, is permitted in the Fifth Circuit. The District of Columbia, Ninth, and Tenth Circuits permit records to be reproduced by copying processes. The Committee feels that recent and impending advances in the arts of duplicating and copying warrant experimentation with less costly forms of reproduction than those now generally authorized. The proposed rule permits, in effect, the use of any process other than the carbon copy process which produces a clean, readable page. What constitutes such is left in first instance to the parties and ultimately to the court to determine. The final sentence of the first paragraph of subdivision (a) is added to allow the use of multilith, mimeograph, or other forms of copies of the reporter's original transcript whenever such are available.

Cross References

Typewritten briefs, appendices, and other papers allowed in forma pauperis, see rule 24(c).

Library References

Courts ⇐405(16.4) et seq. C.J.S. Federal Courts § 295(10).

Notes of Decisions

1. Generally

Former rule obtaining in some circuits, which dispensed altogether with the printing of a record, and which required counsel to print in their briefs such part of the record as they thought appropriate, did not apply in the Fifth Circuit. Phillips Petroleum Co. v. Williams, C.C.A.Tex.1947, 159 F.2d 1011.

2. Sanctions for failure to comply

Where brief of the appellees was not in conformity with former court rule as to form, the appellees would be denied recovery of their costs on appeal. Utility Service Corp. v. Hillman Transp. Co., C.A.Pa.1957, 244 F.2d 121.

3. Relief from printing requirement

Relief from requirement of printing appendix is freely granted those financially burdened by fulfilling requirements of printing. Arnold Productions Inc. v. Favorite Films Corp., C.A.N.Y.1961, 291 F. 2d 94.

4. Typewritten briefs

Where good cause appeared, movant's motion to proceed on typewritten briefs on appeal in habeas corpus proceeding was granted. Fleish v. Swope, C.A.9, 1955, 221 F.2d 556.

Rule 33. Prehearing Conference

The court may direct the attorneys for the parties to appear before the court or a judge thereof for a prehearing conference to consider the simplification of the issues and such other matters as may aid in the disposition of the proceeding by the court. The court or judge shall make an order which recites the action taken at the conference and the agreements made by the parties as to any of the matters considered and which limits the issues to those not disposed of by admissions or agreements of counsel, and such order when entered controls the subsequent course of the proceeding, unless modified to prevent manifest injustice.

Notes of Advisory Committee on Appellate Rules

The uniform rule for review or enforcement of orders of administrative agencies, boards, commissions or officers (see the general note following Rule 15) authorizes a prehearing conference in agency review proceedings. The same considerations which make a prehearing conference desirable in such proceedings may be present in certain cases on appeal from the district courts. The proposed rule is based upon subdivision 11 of the present uniform rule for review of agency orders.

Cross References

Pre-trial procedure in the district courts, see Rule 16, Federal Rules of Civil Procedure, 28 U.S.C.A.

Library References

Appeal and Error ⇐820 et seq. C.J.S. Federal Courts §§ 284, 293(1, 17), 300(1).
Courts ⇐405(14.3).

W. 449, 137 Neb. 578; Ex parte Seymore, 1936, 89 So.2d 83, 264 Ala. 618.

Probation is an act of clemency and proceedings connected therewith are not a phase of the criminal prosecution in which accused has a right to appear and defend. People v. Sweeden, Cal.1953, 254 P.2d 899.

Limits on exercise of jurisdiction are not mechanical or quantitative, but consist of requirement that statutory provisions conferring jurisdiction upon courts of any state must be fair and reasonable in circumstances and must give to defendant adequate and realistic opportunity to appear and be heard in his own defense. Gavenda Bros., Inc. v. Elkins Limestone Co., W.Va.1960, 116 S.E.2d 910.

Essential elements of due process of law, are notice and opportunity to be heard and to defend in orderly proceeding adapted to nature of case. Louisiana Materials Co. v. Cronvich, 1970, 236 So.2d 510, 25 La.App. 1039, writ issued 239 So.2d 356, 256 La. 849, reversed on other grounds 249 So.2d 123, 258 La. 1039. See, also, Skinner v. State ex rel. Williamson, 1941, 115 P.2d 123, 189 Okl. 235, reversed on other grounds 62 S.Ct. 1110, 316 U.S. 535, 86 L.Ed.2d 1655; Barnett v. Cook County, 1944, 57 N.E.2d 873, 388 Ill. 251.

Rejection of defense lawfully vested under law of jurisdiction which governs rights and obligations under contract constitutes deprivation of due process of law guaranteed by this amendment and Florida Declaration of Rights. Confederation Life Ass'n v. Ugalde, Fla.App. 1963, 151 So.2d 315, affirmed in part, reversed in part on other grounds 164 So. 2d 1, on remand 163 So.2d 343.

Where contemptuous language concerning presiding judge was allegedly spoken when judge had retired to his chambers following announcement of decision, so that court could not proceed to punish speaker upon its own knowledge of facts, but had to hold hearing and rely on testimony of witnesses, speaker was entitled to notice of charge and reasonable opportunity to prepare defense, to employ counsel to call witnesses, and to make record on which order could be reviewed on appeal. Ex parte Wisdom, 1955, 79 So.2d 523, 223 Miss. 865.

Where contemptuous language concerning presiding judge was allegedly spoken when judge had retired to his chambers following announcement of decision, whereupon court took testimony of deputy sheriff who had heard the offending remarks and then took testimony of speaker, who denied making the remarks, and where court then found that speaker had used vulgar, profane and indecent language toward court, and that he had lied in denying it, and adjudged speaker guilty of direct contempt and sentenced him, notice of charge and opportunity to make defense given speaker were insufficient. Id.

Generally, requirements of due process are met where the notice is sufficient to advise the defendant of the charge or claim against him and gives him ample opportunity to present his defense to it. State ex rel. Murphy-McDonald Builders Supply Co. v. Parks, Fla.1949, 43 So.2d 347.

The requirement of "due process of law" is not satisfied by a hearing if person whose life, liberty or property is at stake, is not permitted to interpose reasonable and legitimate defenses. State ex rel. Paoli v. Baldwin, 1947, 31 So.2d 627, 159 Fla. 165.

Due process is satisfied if a reasonable opportunity is extended to one granted a conditional pardon to explain away an accusation that he violated conditions upon which it was granted. State v. Brantley, Mo.1962, 353 S.W.2d 793.

A newspaper and its editor and cartoonist were not denied procedural "due process of law" on ground that trial court prejudged their contempt case before the returns were filed and before they could present arguments, where citation gave them right to file a return, they were offered opportunity to introduce evidence which they refused to take, they were permitted to present arguments as to law, and at close of arguments trial court took case under advisement considering it for several days before rendering a decision, and in its judgment court exonerated another person who was also charged with contempt. State ex rel. Pulitzer Pub. Co. v. Coleman, 1941, 152 S.W.2d 640, 347 Mo. 1239.

Offer of proof that fire insurance companies had no money or property acquired pursuant to erroneous judgment, setting aside insurance superintendent's rate-reduction order, did not support contention that circuit court refused them right to present defense to superintendent's motion for restitution of excess premiums, collected pending litigation, in violation of this clause, by refusing to hear evidence and appointing masters to do so; offer being qualified and evasive. State v. Sevier, 1934, 73 S.W.2d 361, 335 Mo. 269, certiorari denied 55 S.Ct. 99, 293 U.S. 585, 79 L.Ed. 680.

Note 806

Notice of specific charge against defendant is a constitutional right of accused. People v. Pond, 1955, 284 P.2d 793, 44 C.2d 665.

Notice to a party whose rights are to be affected by a judicial proceeding is an essential element of "due process of law". In re Hampton's Estate, Cal.App. 1942, 127 P.2d 38.

Under this amendment's guarantee of due process, any judicial process can be made effective only on sufficient notice to parties concerned. State Bank of Dodge City v. McKibben, 1937, 70 P.2d 1, 146 Kan. 341.

The procedural machinery prescribed by G.S. § 1-105 for giving notice is not invalid as violative of this clause for failure to provide adequate notice to party sued. Bailey v. McPherson, 1951, 63 S.E.2d 559, 233 N.C. 231.

Essential to constitutional due process are notice and opportunity to be heard and to be defended in an orderly proceeding adapted to the nature of the case. Smith v. Department of Public Safety, La.App.1971, 254 So.2d 515.

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of pendency of action and afford them an opportunity to present their objections. City of Houston v. Fore, Tex.Civ.App.1966, 401 S.W.2d 921, affirmed 412 S.W.2d 35.

806. —— Criminal matters

"Due process of law" is satisfied when a person in court is convicted of crime after having been fairly apprised of the charges against him and after a fair trial in accordance with constitutional procedural safeguards. Frisbie v. Collins, Mich.1952, 72 S.Ct. 509, 342 U.S. 519, 96 L.Ed. 541, rehearing denied 72 S.Ct. 768, 343 U.S. 937, 96 L.Ed. 1344.

"Due process of law" requires that no person shall be tried and convicted of an offense unless he is given reasonable notice of the charges against him and is afforded an opportunity to examine adverse witnesses. Williams v. People of State of N. Y., N.Y.1949, 69 S.Ct. 1079, 337 U.S. 241, 93 L.Ed. 1337, rehearing denied 69 S.Ct. 1529, 337 U.S. 961, 93 L.Ed. 1760, rehearing denied 70 S.Ct. 34, 338 U.S. 841, 94 L.Ed. 514.

Notice of specific charge and a chance to be heard in a trial of the issues raised by that charge, if desired, are

Note 355

States. Alexander v. Alexander, D.C.S.C.1956, 140 F.Supp. 925.

The right to due process of law under this clause is a right extended to all persons irrespective of citizenship, and therefore is not a right which is inherent in citizenship or pertains to citizenship as such, nor is it wholly dependent for its existence upon any act of Congress or constitutional provision, in that the right to enjoy life and property is fundamental right existing prior to adoption of Constitution, with result that 18 U.S.C.A. 241 making conspiracy against rights of citizens a crime is not ordinarily deemed applicable to deprivation of due process of law under this clause. U. S. v. Bailes, D.C.W.Va.1954, 120 F.Supp. 614.

This clause forbids state legislation denying due process to citizens of the United States wherever domiciled. Ratta v. Healy, D.C.N.H.1932, 1 F.Supp. 669, affirmed 67 F.2d 554, reversed on other grounds 54 S.Ct. 709, 292 U.S. 263, 78 L.Ed. 1248.

356. Convicts or prisoners

In many respects constitutionally protected freedoms enjoyed by citizens-at-large may be withdrawn or constricted as to state prisoners so far as justified by considerations underlying penal system. Sostre v. McGinnis, C.A.N.Y.1971, 442 F.2d 178.

State prisoner was entitled to due process of law before he was punished for an infraction of prison rules. Id.

Imprisonment unavoidably results in forfeiture of certain rights and privileges commonly exercised in free society. Gittlemacker v. Prasse, C.A.Pa.1970, 428 F.2d 1.

Upon entering prison, inmate does not lose all his constitutional rights. Bethea v. Crouse, C.A.Kan.1969, 417 F.2d 504.

Prisoners are protected by this clause and equal protection clause of this amendment. Smith v. Schneckcloth, C.A.Cal.1969, 414 F.2d 680.

State prisoner does not lose all his civil rights during and because of incarceration, and, in particular, continues to be protected by this clause and equal protection clause. Jackson v. Bishop, C.A.Ark.1968, 404 F.2d 571.

Only federal restraint to state action depriving convict of rights lies in Constitution and statutes in enforcement thereof, specifically equal protection clause of this amendment and this clause and proscription of denial to citizens of United States of right to vote on account of race, color, or previous condition of servitude. Id.

Prisoners do not lose all of their constitutional rights, and this clause and equal protection clause follow them into prison and protect them from unconstitutional action on part of prison authorities carried out under color of state law. Jackson v. Godwin, C.A.Fla.1968, 400 F.2d 529. See, also, Fortune Soc. v. McGinnis, D.C.N.Y.1970, 319 F.Supp. 901; Knuckles v. Prasse, D.C.Pa.1969, 302 F.Supp. 1036, affirmed 435 F.2d 1255, certiorari denied 91 S.Ct. 2202, 403 U.S. 936, 29 L.Ed.2d 717, rehearing denied 92 S.Ct. 33, 404 U.S. 877, 30 L.Ed.2d 125; Washington v. Lee, D.C.Ala.1966, 263 F.Supp. 327, affirmed 88 S.Ct. 994, 390 U.S. 333, 19 L.Ed.2d 1212; Talley v. Stephens, D.C.Ark.1965, 247 F.Supp. 683.

State prisoners have constitutional right to be free from cruel and unusual punishment and to be accorded unfettered access to courts to seek vindication of their rights. Landman v. Peyton, C.A.Va.1966, 370 F.2d 135, certiorari denied 87 S.Ct. 2112, 388 U.S. 920, 18 L.Ed.2d 1367.

Prisoners do not lose all of their constitutional rights when they enter a penal institution but retain all of their constitutional rights except for those which must be impinged upon for security or rehabilitative purposes. Jones v. Wittenberg, D.C.Ohio 1971, 323 F.Supp. 93, opinion supplemented 330 F.Supp. 707.

Although a prisoner does not possess all of the rights of ordinary citizen he is entitled to procedural due process commensurate with practical problems faced in prison life. Carothers v. Follette, D.C.N.Y.1970, 314 F.Supp. 1014.

Lawful incarceration brings about necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying the penal system. Id.

A prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law. Id.

This clause and equal protection clause of this amendment follow prisoners into prison. Rodriquez v. McGinnis, D.C.N.Y.1969, 307 F.Supp. 627, reversed on other grounds 451 F.2d 730.

Convicts lose many of rights and privileges of law abiding citizens, but do not lose all civil rights and this clause follows them into prison. Jackson v. Bish

k.1938, 268 F.Supp. 804, vacated rounds 404 F.2d 571.

incarceration involves neces- drawal or limitation of many and rights, justified by con- underlying penal system, and where fundamental, humane sary rights are breached that nal protections become in- ay v. Com. of Pa., D.C.Pa.1967, . 630.

uthorities are not permitted to on convicts cruel and unusual nts for violations of prison y may not discriminate invidi- inst prisoner or class of pris- d they may not deny to pris- nable access to courts to test f his confinement or to secure rotection of his constitutional alley v. Stephens, D.C.Ark.1965, . 683.

status as prisoner does not im of his rights under this tate v. Holmes, 1970, 262 A.2d J.Super. 180.

icted felon, although civilly nevertheless a "person" entitled tion of this clause. Ex parte 2, 372 P.2d 310, 57 C.2d 860, 22 478.

of state prisons may not be assert usual federal constitu- hts guaranteed nonincarcerated Ex parte Ferguson, 1961, 361 55 C.2d 663, 12 Cal.Rptr. 753, denied 82 S.Ct. 111, 128, 368 U.S. L.Ed.2d 61, 79.

erations—Generally

rson cannot be deprived of ts of freedom of speech and of since the liberty guaranteed ause is the liberty of natural, cial, persons. Hague v. Com- Industrial Organization, N.J. .Ct. 954, 307 U.S. 496, 83 L.Ed.

iberty" guaranteed by this the liberty of natural, not arti- sons. Western Turf Assoc. v. , Cal.1907, 27 S.Ct. 384, 204 U.S E4. 520. See, also, Northwest- L. Ins. Co. v. Riggs, Mo.1908, 27 203 U.S. 243, 51 L.Ed. 168, 7 1104; Oner v. Oklahoma City, 1941, 120 F.2d 861.

oad corporation is a person meaning of this amendment. Ames, Neb.1896, 18 S.Ct. 418, 518, 42 L.Ed. 819. See, also, Development Corp. v. Mitchell

D.C.Ill.1960, 182 F.Supp. 681, affirmed in part, reversed in part on other grounds 286 F.2d 222.

Corporations are persons within the meaning of this amendment, forbidding deprivation of property without due process of law, as well as a denial of the equal protection of the law. Covington, etc., Turnpike Road Co. v. Sandford, Ky.1896, 17 S.Ct. 198, 164 U.S. 592, 41 L.Ed. 560. See, also, Orosjean v. American Press Co., La.1936, 56 S.Ct. 444, 297 U.S. 233, 80 L.Ed. 660; Louis K. Liggett Co. v. Baldridge, Pa.1928, 49 S.Ct. 57, 278 U.S. 105, 73 L.Ed. 204; Lake Shore, etc., R. Co. v. Smith, Mich.1899, 19 S.Ct. 565, 173 U.S. 684, 43 L.Ed. 858; Gulf, etc., R. Co. v. Ellis, Tex.1897, 17 S.Ct. 255, 165 U.S. 150, 41 L.Ed. 666; Charlotte, etc., R. Co. v. Gibbes, S.C.1892, 12 S.Ct. 255, 142 U.S. 386, 35 L.Ed. 1051; Home Ins. Co. v. New York, N.Y.1890, 10 S.Ct. 593, 134 U.S. 606, 33 L.Ed. 1025; Minneapolis, etc., R. Co. v. Beckwith, Iowa 1889, 9 S.Ct. 207, 129 U.S. 28, 32 L.Ed. 585; Missouri Pac. R. Co. v. Mackay, Kan.1888, 8 S.Ct. 1161, 127 U.S. 209, 32 L.Ed. 107; Pembina Consol. Silver Min., etc., Co. v. Pennsylvania, Pa.1888, 8 S.Ct. 737, 125 U.S. 189, 31 L.Ed. 650; Santa Clara County v. Southern Pac. R. Co., Cal.1886, 6 S.Ct. 1132, 118 U. S. 394, 30 L.Ed. 118; Oney v. Oklahoma City, C.C.A.Okl.1941, 120 F.2d 861; Investors' Syndicate v. Porter, D.C.Mont.1931, 52 F.2d 189, reversed on other grounds 52 S.Ct. 617, 286 U.S. 461, 76 L.Ed. 1226, affirmed on rehearing 53 S.Ct. 122, 287 U.S. 346, 77 L.Ed. 354; Garysburg Mfg. Co. v. Pender County, D.C.N.C.1930, 42 F.2d 500; Ward Baking Co. v. City of Fernandina, Fla., D.C.Fla.1928, 29 F.2d 789; Leecraft v. Texas Co., C.C.A.Okl.1922, 281 F. 918, error dismissed 43 S.Ct. 699, 262 U.S. 732, 67 L.Ed. 1205; Scott v. Frazier, D.C.N.D.1919, 258 F. 669, reversed on other grounds 40 S.Ct. 503, 253 U.S. 243, 64 L.Ed. 883; Wilmington City R. Co. v. Taylor, D.C.Del.1912, 198 F. 159; Singer Mfg. Co. v. Wright, C.C.Ga.1887, 33 F. 121, appeal dismissed 12 S.Ct. 103, 141 U. S. 696, 35 L.Ed. 906; Railroad Tax Cases, C.C.Cal.1882, 13 F. 722, error dismissed 6 S.Ct. 317, 116 U.S. 138, 29 L.Ed. 589; San Mateo County v. Southern Pac. R. Co., C.C.Cal.1882, 13 F. 145; Providence Journal Co. v. McCoy, D.C.R.I.1950, 94 F.Supp. 186, affirmed 190 F.2d 760, certiorari denied 72 S.Ct. 200, 342 U.S. 894, 96 L.Ed. 669; Merced Dredging Co. v. Merced County, D.C.Cal.1946, 67 F. Supp. 596; Springfield Fire & Marine Ins. Co. v. Holmes, D.C.Mont.1940, 32 F. Supp. 964.

[redacted]poration is "person" within mean- [redacted] equal protection clause and this

condition that Board of Prison Terms and Paroles might at any time cause parolee to be returned to penitentiary to serve sentence, arrest of parolee in Oregon and his return to Washington pursuant to interstate compact for supervision of parolees and probationers to which Washington and Oregon were parties did not deprive parolee of his liberty without due process of law. Pierce v. Smith, 1948, 195 P.2d 112, 31 Wash.2d 52.

633. Extraterritorial arrest by bail

The arrest of a principal by his bail in a state other than that where the bail was given is not a denial of due process of law. There is a fundamental difference between the right of arrest by bail and arrest under warrant where such right to arrest is based upon a court process, which, per se, can have no extra-jurisdictional power of efficacy. The latter right depends upon the process of the court which issued it, and necessarily such process confers no power outside that jurisdiction. The former arrest, viz., of principal by bail, is based upon the relationship which the parties have established between themselves, and consequently, as between the parties, is not confined to any locality or jurisdiction. In re Von Der Ahe, C.C.Pa.1898, 85 F. 959. See, also, Taylor v. Taintor, Conn. 1873, 83 U.S. 371, 1 Wall. 371, 21 L.Ed. 287.

634. Fairness of trial—Generally

See, also, Notes of Decisions under Amend. 5.

Apart from trials conducted in violation of express constitutional mandates, a "constitutionally unfair trial" takes place where the barriers and safeguards are so relaxed or forgotten that the proceeding is more a spectacle or trial by ordeal than a disciplined contest. U. S. v. Augenblick, 1969, 89 S.Ct. 528, 393 U.S. 348, 21 L.Ed.2d 537.

Failure to accord accused fair hearing violates minimal standards of due process. Irvin v. Dowd, Ind.1961, 81 S.Ct. 1639, 366 U.S. 717, 6 L.Ed.2d 751. See, also, People v. Whitmore, 1965, 257 N.Y. S.2d 787, 45 Misc.2d 506, reversed on other grounds 278 N.Y.S.2d 706, 27 A.D.2d 939.

A fair trial in a fair tribunal is a basic requirement of due process, and requires an absence of actual bias in trial of cases. In re Murchison, Mich.1955, 75 S.Ct. 623, 349 U.S. 133, 99 L.Ed. 942. See, also, U. S. ex rel. Drew v. Myers, C.A.Pa. 1961, 327 F.2d 174, certiorari denied 85 S. Ct. 88, 379 U.S. 847, 13 L.Ed.2d 52.

This clause guarantees fair trial. Braley v. Gladden, C.A.Or.1968, 403 F.2d 858. See; also, McMullen v. Maxwell, 1965, 209 N.E.2d 449, 3 Ohio St.2d 189, State v. Reardon, 1965, 73 N.W.2d 162, 245 Minn. 509.

Denial of fair and impartial trial, as guaranteed by Amend. 6, constitutes denial of due process, demanded by this amendment, and Amend. 5, and failure to strictly observe those constitutional safeguards renders a trial and conviction illegal and void, and redress therefor is within ambit of habeas corpus. Lane v. Warden, Md. Penitentiary, C.A.Md.1967, 379 F.2d 179.

Denial of due process in trial of criminal case in state court sufficient to constitute impingement of right to fair trial justifying federal court interference is failure to observe that fundamental fairness essential to very concept of justice. Hendrix v. Haad, C.A.Kan.1962, 312 F.2d 147. See, also, Nolen v. Wilson, C.A.Cal. 1967, 372 F.2d 15, certiorari denied 87 S. Ct. 2085, 387 U.S. 948, 18 L.Ed.2d 1337.

Requirement of this amendment is for a fair trial and this clause prohibits conviction and incarceration of one whose trial is offensive to common and fundamental ideas of fairness and right. Brumbaker v. Dickson, C.A.Cal.1962, 310 F.2d 30, certiorari denied 83 S.Ct. 1110, 372 U.S. 978, 10 L.Ed.2d 143.

The denial of a fair and impartial trial as guaranteed by Amend. 6 is also a denial of "due process of law" demanded by Amend. 5, and this amendment, and the failure to strictly observe these constitutional safeguards renders the trial and conviction for a criminal offense illegal and void and redress therefor is within the ambit of "habeas corpus." Baker v. Hudspeth, C.C.A.Kan.1942, 129 F.2d 779, certiorari denied 63 S.Ct. 291, 317 U.S. 681, 87 L.Ed. 546, rehearing denied 63 S.Ct. 264, 317 U.S. 711, 87 L.Ed. 566, rehearing denied 63 S.Ct. 787, 318 U. S. 800, 87 L.Ed. 1164.

Federal rights to a fair trial are denied only when conduct complained of is so fundamentally unfair that the conduct complained of can be said to shock the conscience of the English speaking peoples, or is conduct which has been held to be presumptively violative of this amendment. Procella v. Beto, D.C.Tex. 1970, 319 F.Supp. 662.

Right to fair trial may not be abrogated even if evidence of guilt is overwhelming. Imbler v. Craven, D.C.Cal. 1969, 298 F.Supp. 795, affirmed 424 F.2d 631, certiorari denied 91 S.Ct. 100, 400 U.

S. 865, 27 L.Ed.2d 104. See, also, Jackson v. People of Cal., C.A.Cal.1964, 336 F.2d 521; State v. Weigand, 1970, 466 P.2d 331, 204 Kan. 666.

Lack of fair trial denies due process and redress for such denial lies within ambit of habeas corpus. Frayer v. Turner, D.C.Utah 1969, 296 F.Supp. 1256, affirmed 413 F.2d 546.

Accused is not entitled to an error-free trial, but rather one that does not deprive him of any basic rights amounting to denial of due process. Lewis v. Peyton, D.C.Va.1968, 291 F.Supp. 753.

Effective administration of justice means not only a fair trial for defendant but also a fair trial for state, and due process, as contemplated by this amendment, is not a one-way street. Mistner v. Davenport, D.C.N.J.1965, 288 F.Supp. 926, affirmed 410 F.2d 1276, certiorari denied 90 S.Ct. 570, 390 U.S. 1015, 24 L.Ed. 2d 506.

Fairness is a requirement of due process. Petition of Wright, D.C.Ark.1968, 282 F.Supp. 999. See, also, Cappetta v. State, Fla.App.1967, 204 So.2d 913.

Where a state criminal trial is conducted in disregard of right of an accused to a fair and impartial trial, "due process" is offended and this amendment is operative to render the judgment of conviction void. Application of Stecker, D.C.N.J.1966, 271 F.Supp. 400, affirmed 381 F.2d 379, certiorari denied 88 S.Ct. 280, 389 U.S. 929, 19 L.Ed.2d 280.

A fair trial in fair tribunal is a basic requirement of due process. Hobson v. Hansen, D.C.D.C.1967, 265 F.Supp. 902. See, also, Turner v. State of La., La.1965, 85 S.Ct. 546, 379 U.S. 466, 13 L.Ed.2d 424; Fugate v. Gaffney, D.C.Neb.1970, 313 F. Supp. 128, affirmed 453 F.2d 362; Rice v. Rigsby, 1963, 151 S.E.2d 469, 259 N.C 506.

An accused is entitled to a fair trial but not to a perfect one in all matters of trial judgment. Elam v. Peyton, D. C.Va.1967, 265 F.Supp. 231. See, also, Harney v. U. S., C.A.Mass.1962, 306 F.2d 322, certiorari denied 83 S.Ct. 254, 371 U. S. 911, 9 L.Ed.2d 171 (2 mems); Frayer v. Turner, D.C.Utah 1960, 290 F.Supp. 1256, affirmed 413 F.2d 546; Opie v. Meacham, D.C.Wyo.1968, 293 F.Supp. 647, affirmed 419 F.2d 465, certiorari denied 90 S.Ct. 2239, 399 U.S. 927, 26 L.Ed.2d 793; Petition of Wright, D.C.Ark.1968, 282 F. Supp. 999.

Right to fair trial guaranteed in Amend. 6, is also embodied and applied as to State court proceedings in this clause. U. S. ex rel. Maldonado v. Denno, D.C.N.Y.1965, 239 F.Supp. 851, affirmed 348 F.2d 12, certiorari denied 86 S.Ct. 1950, 384 U.S. 1007, 16 L.Ed.2d 1020. See, also, Craemer v. Superior Court In and For Marin County, 1968, 71 Cal.Rptr. 193, 265 C.A.2d 216.

One prerequisite of a fair trial is accused's right to defend himself either in person or by counsel of his own choosing. U. S. ex rel. Maldonado v. Denno, D.C.N.Y.1965, 239 F.Supp. 851, affirmed 348 F.2d 12, certiorari denied 86 S.Ct. 1950, 384 U.S. 1007, 16 L.Ed.2d 1020. See, also, Cappetta v. State, Fla.App.1967, 204 So.2d 913.

Federal court can upset state court judgment of conviction only when wrong complained of necessarily denied defendant a fair trial. U. S. ex rel. Hirch v. Fay, D.C.N.Y.1961, 190 F.Supp. 105.

In habeas corpus involving whether due process of law was done under this amendment in a state court conviction of murder, the federal district court was not concerned with the guilt or innocence of the accused but whether he received a fair and impartial trial which was his right under said amendment. U. S. ex rel. Sheffield v. Waller, D.C.La. 1964, 126 F.Supp. 537, certificate denied 224 F.2d 280, certiorari denied 76 S.Ct. 217, 350 U.S. 922, 100 L.Ed. 807.

This clause embraces requirement that no trial shall deprive a defendant of the constitutional safeguards which are of fundamental importance and a necessary part of a fair trial. U. S. ex rel. Montgomery v. Rageu, D.C.Ill.1949, 86 F.Supp. 382.

This amendment guarantees one accused of crime not only forms, but fundamentals of fair trial. Commonwealth v. Petrillo, 1940, 12 A.2d 317, 336 Pa. 65.

Deprivation of accused's absolute right to a fair and impartial trial reduces process of law to a mere sham and destroys hope of fundamental fairness and undermines provision of this amendment. People v. Whitmore, 1965, 257 N.Y.S.2d 787, 45 Misc.2d 506, reversed on other grounds 278 N.Y.S.2d 706, 27 A.D.2d 939.

A defendant must be given a fair and impartial hearing. Corbin v. Broadman, 1967, 433 P.2d 299, 6 Ariz.App. 490, 31 A. L.R.3d 942.

As applied to criminal trial, "due process of law" requires observance of fundamental fairness essential to very concept of justice, and to constitute denial of due process, absence of such fairness must fatally infect trial and acts complained of must be of such quality as

Where public disclosure of trade secrets occurred about time of judgment enjoining defendants from using trade secrets individual defendants gained in employment with plaintiff it was proper that injunctive period be made to run from date of judgment, and where stays were limited in scope they did not justify extension of two-year injunctive period. Id.

Plaintiff's trade secrets embodied in design of precision tape recorder and reproducer would shortly be fully disclosed, through no fault of defendant corporation formed by plaintiff's former employees, and court properly limited to two-year period duration of injunctive relief against use of trade secrets. Id.

While a temporary restraining order did not designate a 10-day limit as required by this rule, but on the contrary provided that it would remain in force until the application for a preliminary injunction had been heard, such fact, under the circumstances, was insufficient to alter essential character of such order as a temporary restraining order. Pennsylvania Motor Truck Ass'n v. Port of Philadelphia Marine Terminal Ass'n, C.A.Pa. 1960, 276 F.2d 931.

A temporary restraining order may not be issued for a period in excess of ten days, even if the order is made in the presence of but without the consent of the affected party, and no such consent can be implied where the party affected objects to the issuance of the order even if the grounds of the objection are not legally tenable. Connell v. Dullen-Steel Products, Inc., C.A.La.1957, 240 F.2d 414.

Where duration of order restraining judgment creditor from enforcing a state court judgment barely extended beyond 20 days such order was not a "temporary injunction" and therefore was not appealable under section 1292 of this title providing for appeal from orders granting injunctions. Id.

Temporary restraining order should not be kept in effect for many months without making it a temporary injunction. Metaleck Repair Service v. Harman, C.A.Ohio 1954, 216 F.2d 611.

Under subdivision (b) of this rule, trial judge can issue temporary restraining order to preserve status quo, and such order may endure for 20 days, but no longer, without consent of party against whom it is issued, and within the 20-day period which affords opportunity for hearing, such facts must be presented to court as will justify the tribunal in exercise of sound legal discretion to issue preliminary injunction. Sims v. Greene, C.C.A.Pa.1947, 161 F.2d 87.

An injunctive order upon expiring becomes moot. Chicago Great Western Ry. Co. v. Beecher, C.C.A.Minn.1945, 150 F. 2d 304, certiorari denied 66 S.Ct. 339, 326 U.S. 781, 90 L.Ed. 473.

Where an order, temporarily restraining heirs of deceased debtor from settling without consent of bankruptcy court a civil suit instituted by the debtor, was entered without the application therefor ever having been set down for hearing or notice of such hearing ever having been received by the heirs, such temporary restraining order expired after ten days in accordance with this rule, notwithstanding copies of application for order were mailed to heirs. Benites v. Anciani, C.C.A.Puerto Rico 1942, 127 F.2d 121, 49 Am.Bankr.Rep.N.S. 74, certiorari denied 63 S.Ct. 439, 317 U.S. 699, 87 L.Ed. 559.

Where order temporarily restraining defendants from negotiating warehouse receipts was issued without notice to defendants, and did not provide any time for expiration, it expended its force after expiration of ten days from its entry on May 29, 1940, under these rules providing that every temporary restraining order granted without notice shall expire by its terms within such term after entry, not to exceed ten days, as the court fixes. Southard & Co. v. Salinger, C.C.A. Ill.1941, 117 F.2d 194.

Under record in anti-trust action, restraining order ended on day that temporary injunction was ruled or at least it was dormant from time of issuance of temporary injunction until the restraining order was resuscitated by court when modified restraining order was entered. Donnelly Garment Co. v. International Ladies' Garment Workers' Union, D.C. Mo.1944, 55 F.Supp. 572, affirmed 147 F. 2d 240, certiorari denied 65 S.Ct. 1068, 325 U.S. 852, 89 L.Ed. 1972.

This rule providing for notice and maximum 10 days' duration of restraining orders was inapplicable to order secured pursuant to Supplemental Rule F of these rules enjoining prosecution of action outside limitation proceeding since order under Supplemental Rule F of these rules operates with respect to suits which have not even been filed and claims which have not even been heard of. In re Pacific Far East Line, Inc., D.C.Cal.1967, 43 F.R.D. 283.

213. Continuance of order

Where government instituted suit for declaratory judgment regarding defend-

ilateral power to terminate
t regarding terms and condi-
employment in respect to coal
n government possession and
ued temporary restraining order
ime fixed for expiration thereof
s then in progress argument on
ts' motion to vacate rule to
ise, a part of contempt proceed-
restraining order was properly
. U. S. v. United Mine Workers
ica, App.D.C.1947, 67 S.Ct. 677, 330
91 L.Ed. 884.

ler which extended temporary re-
order beyond 20 days allowed
rule was not valid where it was
ported by findings of fact and
ons of law. National Mediation
Air Line Pilots Ass'n, Intern., C.
963, 323 F.2d 305.

rder extending a temporary re-
g order beyond 20 days allowed
livision (b) of this rule is tanta-
to grant of a preliminary injunc-
d.

mporary restraining order cannot
inued beyond 20 days unless the
gainst whom the order is directed
s that the order may be extended
nger period.' Sims v. Greene, C.C.A.
, 160 F.2d 512.

minary injunction against use by
ASC committee and its members of
methods to force county ASC com-
to relocate its office would not be
ed where there was new county
tee which had power, subject to
al of state committee, to decide on
ion, if any. Schuetzie v. Duba, D.
962, 201 F.Supp. 754.

anti-trust action, the court had
o grant a continuance of restrain-
der on condition that bond cover
ly continuance of restraining order
so its original issuance. Donnelly
nt Co. v. International Ladies'
nt Workers' Union, D.C.Mo.1944, 55
. 572, affirmed 147 F.2d 246, certio-
nied 65 S.Ct. 1088, 325 U.S. 852, 89
1972.

Effective date of injunction

preliminary injunction granted
if in unfair competition case
become effective as of time of fil-
security as required by subdivi-
c) of this rule. Gamlen Chemical
. Gamlen, D.C.Pa.1948, 79 F.Supp.

Conditions attached of remedy

eral District Court has inherent au-
y to condition injunctive relief or
its mandatory equivalent on such terms
as to it may seem equitable. Salsbury v.
U. S., 1966, 356 F.2d 822, 123 U.S.App.D.C.
69. See, also, Brotherhood of Locomotive
Engineers v. Missouri-Kansas-Texas R.
Co., Tex.1960, 80 S.Ct. 1326, 363 U.S. 528, 4
L.Ed.2d 1379, rehearing denied 81 S.Ct. 31,
364 U.S. 854, 5 L.Ed.2d 78; New York, C.
& St. L. R. Co. v. Brotherhood of Loco-
motive Firemen and Enginemen, C.A.Ohio
1966, 356 F.2d 464.

Trial court has, where interests of jus-
tice so require, plenary powers to set
aside or otherwise modify its interlocuto-
ry orders at any time before final judg-
ment, and can so condition order allow-
ing series of amended complaint.
Schoen v. Washington Post, 1957, 246 F.
2d 670, 100 U.S.App.D.C. 380.

Award of interlocutory injunction is
not matter of right, and court will avoid
injury so far as may be by attaching
conditions which will protect all whose
interests the injunction may affect. Tex-
as Pacific-Missouri Pac.-Terminal R. R.
of New Orleans v. Brotherhood of Ry.
and S. S. Clerks, Freight Handlers, Exp.
and Station Emp., D.C.La.1964, 232 F.
Supp. 33. See, also, Brotherhood of Lo-
comotive Engineers v. Missouri-Kansas-
Texas R. Co., Tex.1960, 80 S.Ct. 1326, 363
U.S. 528, 4 L.Ed.2d 1379, rehearing denied
81 S.Ct. 31, 364 U.S. 854, 5 L.Ed.2d 78.

Court has inherent power to control its
injunctive decrees where changing cir-
cumstances warrant. Humble Oil & Re-
fining Co. v. American Oil Co., D.C.Mo.
1963, 224 F.Supp. 909. See, also, Atlas
Scraper & Engineering Co. v. Purscho,
C.A.Cal.1966, 357 F.2d 206, certiorari de-
nied 87 S.Ct. 47, 385 U.S. 846, 17 L.Ed.2d
76, rehearing denied 87 S.Ct. 699, 385 U.S.
1020, 17 L.Ed.2d 559; In re Certain Car-
riers Represented by Eastern, Western
and Southeastern Carriers' Conference
Committees, D.C.D.C.1965, 241 F.Supp.
1004, remanded on other grounds 349 F.2d
207.

VIII. SECURITY

Subdivision Index

Ref. 24

disapprove any change in tenancy of property in court's custody, statement in application that rent under lease was based upon a percentage of gross income of hotel, and that value of fee simple title would be materially diminished if assignment of lease to tenant who would not properly operate hotel, was permitted, did not support claim that lease was a personal contract, and not assignable, and did not afford any basis for issuance of a permanent injunction. MacFadden-Deauville Hotel v. Murrell, C.A.5, 1960, 282 F.2d 537.

Preliminary injunction against racial segregation in certain grades would be denied where full evidentiary hearing would be required to determine whether board had assigned students solely upon basis of race and what effect transfer would have on school system. Singleton v. Anson County Bd. of Ed., D.C.N.C.1958, 283 F.Supp. 895.

Under particular facts of case, plaintiff who sought readmission to state university was entitled to administrative hearing on his application, conducted in accordance with applicable law, but temporary injunction against university officials would be denied, without prejudice to renewal of motion, in anticipation that court's suggestion as to procedure would be accepted. Schiff v. Hannah, D.C.Mich.1960, 282 F.Supp. 381.

On hearing for preliminary injunction, court need not and does not determine merits of case. Exchange Nat. Bank of Chicago v. Abramson, D.C.Minn.1963, 278 F.Supp. 849.

As respects this rule indicating that applicant for preliminary injunction is entitled to hearing in nature of trial, hearing requires trial of issue of fact and trial of issue of fact necessitates opportunity to present evidence. Hershey Creamery Co. v. Hershey Chocolate Corp., D.C.N.Y.1967, 269 F.Supp. 45.

Where no permanent injunction was sought by either party, it was not possible to consolidate hearing on preliminary injunction with trial on merits and advance the latter. Humble Oil & Refining Co. v. Harang, D.C.La.1960, 202 F.Supp. 39.

Customarily, where many factual elements are in dispute on application for preliminary injunction, hearing is necessary to resolve disputed issues. Rothstein v. Manuti, D.C.N.Y.1964, 235 F.Supp. 49.

Plaintiff who failed to offer testimony on hearing of her motion for temporary restraining order in action brought to enjoin state officials from prosecuting plaintiffs under perjury indictment and for damages for alleged violation of civil rights failed to make a showing which would entitle her to temporary restraining order following defendant's denial of allegations of complaint. Chaffin v. Johnson, D.C.Miss.1964, 229 F.Supp. 62. Affirmed 352 F.2d 514, certiorari denied 86 S.Ct. 1582, 384 U.S. 956, 16 L.Ed.2d 722.

Hearing of plaintiff's motion for a preliminary injunction, in absence of consent, will not generally be deferred as to motion of defendants until final hearing except for good cause shown. U. S. v. Columbia Steel Co., D.C.Del.1947, 71 F. Supp. 734.

332. —— Notice

Where defendant was not given notice that permanent relief would be determined at hearing noticed only for continuance of ex parte restraining order or for issuance of preliminary injunction, noticed hearing for temporary relief was never consolidated with trial on merits for permanent relief, and important genuine factual issues existed, judgment order granting plaintiff full injunctive relief sought would be vacated. Capital City Gas Co. v. Phillips Petroleum Co., C.A. Vt.1967, 373 F.2d 128.

Because of different scope of possible relief, difference in types of evidence admissible, and difference in burden of proof required between permanent and temporary injunctive relief, party is entitled to notice that permanent rather than temporary relief is being determined. Id.

Provision of this rule relating to temporary restraining orders in no way deals with issuance of permanent injunctions and does not prohibit issuance of permanent injunction in a hearing on a motion for preliminary injunction. Brotherhood of R. R. Carmen of America, Local No. 429, v. Chicago & N. W. R. Co., C.A.Iowa 1965, 354 F.2d 786.

That notice was given and hearing held does not extend indefinitely, beyond period limited by this rule time during which temporary restraining order remains effective. Pan Am. World Airways, Inc. v. Flight Engineers' Inter. Ass'n, PAA Chapter, AFL-CIO, C.A.N.Y.1962, 306 F.2d 840.

This rule contemplates that issuance of a preliminary injunction shall be upon notice to the adverse party and after a hearing. Carpenters' Dist. Council of Detroit, Wayne and Oakland Counties and Vicinity, of United Broth. of Carpenters

rs of America, AFL-CIO v. ich.1956, 261 F.2d 5.

urance company, in action in interpleader against annuity obtained preliminary in- training prosecution of state s for conversion of bonds chase of annuity, and subse- rt entered order modifying but did not require an addi- and no written notice was to entry of subsequent order, eficiaries had appeared in of such order did not contra- le requiring notice prior to injunctive order, and did not process. Holcomb v. Aetna o., C.A.Okl.1955, 228 F.2d 75, enied 76 S.Ct. 473, 350 U.S. d. 553, rehearing denied 76 S. .S. 1016, 100 L.Ed. 875.

within this rule prohibiting preliminary injunction with- o adverse party, implies op- be heard, and "hearing" re- of issue of fact, and "trial of t" necessitates opportunity to dence, and not by only one controversy. Sims v. Greene, 7, 161 F.2d 87.

n (b) of this rule that no restraining order shall be hout notice to adverse party in conditions exist is not ap- a preliminary injunction. ina, C.C.A.N.Y.1945, 148 F.2d R. 371.

requiring a showing of an failure to give notice in rela- porary restraining orders was to action required to be hree-judge district court and, no notice or excuse for fail- notice was required since sec- f this title relating to three- ct courts authorizes the court emporary restraining order at ul contains no requirement as Tennessee Public Service Com- U. S., D.C.Tenn.1967, 275 F.

which received written no- plaintiff to discontinue use of its name within one and one- after defendant first an- formation, but which disre- notice and second warning, void imposition of preliminary restraining use of word on it would be greatly damaged. ores, Inc. v. Safeway Proper- D.C.N.Y.1961, 197 F.Supp. 938, F.2d 495.

Order temporarily restraining creditor, who had obtained a lien within four months of filing of petition under section 734 of Title 11 from proceeding with execution process against debtor's property, would not be vacated merely because ten days had expired since its issuance without notice to creditor, since subdivision (b) of this rule providing that a temporary restraining order granted without notice shall expire within ten days unless extended by court, is not applicable in proceedings in bankruptcy. In re Haines Lumber & Millwork Co., D.C.Pa. 1956, 144 F.Supp. 108.

In suit to enjoin optical companies, 22 doctors located in 9 states, and other members of the class from practice of payment of rebates by companies to physicians on prices for spectacles of patients on ground that practice violated the Sherman Anti-Trust Act, sections 1-7 of Title 15, notice of order to show cause served by registered mail on the 2,000 doctors was such notice as required by due process. U. S. v. American Optical Co., D.C.Ill.1951, 97 F.Supp. 66.

Where order to show cause why preliminary injunction should not be granted and copy of complaint and supporting affidavit were served on defendant, no prejudice resulted from failure to give notice of motion for preliminary injunction, and defendant's motion to quash order to show cause was properly denied. Walling v. Moore Milling Co., D.C.Va. 1945, 62 F.Supp. 378.

Where a preliminary injunction is desired, plaintiff need only give his notice of motion as provided by this rule and rule 7(b) of these rules and order to show cause why preliminary injunction should not be granted is improper. Id.

The fact that no injury, loss or damage would result to Price Administrator did not render improper issuance, at instance of Price Administrator and without notice to defendant, of temporary restraining order restraining deliveries of meat in violation of governmental restriction order, since administrator did not bring action in his own right, but as an officer of federal government. Brown v. Bernstein, D.C.Pa.1943, 49 F.Supp. 497.

In view of war emergency, it was proper to issue, without notice to defendant, temporary restraining order restraining further deliveries of meat in violation of governmental restriction order. Id.

This rule providing for notice and maximum 10 days' duration of restraining orders is inapplicable to Supplemental Rule F of these rules enjoining pro-

Rule 25

Note 153

quate. Midland-Ross Corp. v. Yokana, D.C.N.J.1960, 185 F.Supp. 804, affirmed 293 F.2d 411.

The unauthorized seizure of one's papers, if unlawful, and thus an injury, is an irreparable injury. Bell v. Waterfront Commission of New York Harbor, D.C. N.Y.1960, 183 F.Supp. 175, affirmed 279 F.2d 853.

Injunctive relief may be had to restrain third parties from unlawfully inducing another to breach a legal contract to which the latter is a party when it will cause plaintiff irreparable injury. Sunbeam Corp. v. Economy Distributing Co., D.C.Mich.1955, 131 F.Supp. 701.

A district court of the United States, sitting in equity, will restrain an executive agency of the United States acting within the scope of apparent authority only when circumstances demonstrate that irreparable injury will occur to an individual by reason of the application of an unconstitutional law or by the illegal application of a statute otherwise valid. Western Ass'n of Lumbermen & Loggers v. Krug, D.C.Or.1948, 79 F.Supp. 344.

Generally, courts of equity have no jurisdiction over suits for libel or slander to title, but exceptions exist where it is alleged that the adverse party's challenges to the complainant's title are made in bad faith with intent to injure the business of a competitor and where threatened or apprehended repetition of defendant's conduct makes injunctive relief necessary to protect the complainant's rights. Inland Steel Products Co. v. Mi'll Mfg. Corp., D.C.Ill.1959, 25 F.R.D. 238.

154. —— Particular cases not present

Where proceeding before State Labor Relations Commission was concerned only with past conduct of employer in discriminatorily refusing to rehire strikers, the proceeding did not involve such irreparable injury as would warrant federal court of equity in interfering by way of declaratory judgment or injunction. Almeida Bus Lines, Inc. v. Curran, C.A.Mass.1954, 209 F.2d 680.

The enforcement of ordinance against plaintiffs would constitute a violation of their constitutional rights did not entitle plaintiffs to an injunction where there was no showing of such irreparable injury as would warrant a court of equity in restraining criminal prosecutions and there was no reason to think that state courts would not protect constitutional rights of plaintiffs upon such prosecutions being instituted. Spence v. Cole, C.C.A.N.C.1943, 137 F.2d 71.

Where oil companies, which sought to have gasoline service station operator enjoined from suing them for price fixing, failed to show that irreparable injury would result from relitigation and there was doubt as to whether injunctive relief would be appropriate, in view of recent changes of law with respect to price fixing, injunction restraining operator from relitigation of price fixing matters would not be granted. Texaco, Inc. v. Fiumara, D.C.Pa.1964, 232 F.Supp. 757.

Lower landowners would not be entitled to injunctive relief against upper landowners who collected surface water falling on paved shopping center parking area, improperly graded as to drainage, on upper land and poured it on lower land to injury of lower landowners, where damages were not irreparable and flooding was not sufficiently recurring. Williston Apartments, Section F., Inc. v. Berger, D.C.Va.1964, 229 F.Supp. 338.

Plaintiffs, in an action challenging constitutionality of apportionment of members of the General Assembly of the State of Delaware, would not be granted an injunction enjoining an election insofar as it related to election of members of such assembly where there was no showing of irreparable damage, and where if injunction were issued large numbers of electors of the State might be deprived of their franchise on date in question to elect members of the General Assembly. Sincock v. Terry, D.C.Del. 1962, 210 F.Supp. 300, affirmed 84 S.Ct. 1449, 377 U.S. 695, 12 L.Ed.2d 620.

Federal courts should refuse to interfere by injunction with or embarrass threatened prosecution in state courts, except in exceptional cases which call for interposition of court of equity to prevent irreparable injury which is clear and imminent. Clark v. Thompson, D.C. Miss.1962, 206 F.Supp. 539, affirmed 313 F.2d 637, certiorari denied 84 S.Ct. 440, 375 U.S. 951, 11 L.Ed.2d 312.

Defendant was not entitled to enjoin plaintiff from holding its required stockholders' annual meeting where no extreme circumstances existed and no irreparable injury to the defendants had been established. Vanadium Corp. of America v. Susquehanna Corp., D.C.Del. 1962, 203 F.Supp. 686.

Even if subpoenas issued by Waterfront Commission and served on individuals who subsequently brought suit for judgment declaring New York Waterfront Commission Act provision prohibiting

any person from collecting funds or contributions from employees on behalf of union, any one of whose officers or agents is a convicted felon, unconstitutional, were oppressive, relief could be obtained in state court and issuance of such subpoenas did not show great and immediate danger of irreparable injury necessary for federal district court to exercise jurisdiction to enjoin enforcement of the subpoenas and restrain Commission from holding hearing on them. Applegate v. Waterfront Commission of New York Harbor, D.C.N.Y.1960, 184 F.Supp. 33.

Where stockholder sought injunction to restrain Maine corporation from carrying out purported lease of its properties to a Montana corporation, claim of irreparable damage to plaintiff because it would be impracticable for him to maintain a derivative action because of McKinney's N.Y.General Corporation Law, § 61b was without merit, since a law cannot be circumvented by such allegation. Schreiber v. Butte Copper & Zinc Co., D.C.N.Y.1951, 98 F.Supp. 106.

Where record showed only that right to grant exclusive license to a taxicab company to solicit and pick up passengers in area outside of and adjacent to passenger terminal station of railroad which had been demised to city along with railroad terminal which right railroad sought to protect in action to enjoin city from enforcing ordinance permitting all taxicab companies to solicit and pick up passengers in such area, was worth $1800 annually to railroad, and record was barren of any proof of irreparable damage or lack of adequate remedy at law, railroad was not entitled to injunction. Illinois Cent. R. R. v. City of New Orleans, D.C.La.1950, 93 F.Supp. 229, affirmed 187 F.2d 820.

In suit by landlord against city and city housing rent commission for a declaratory judgment and injunction to restrain the putting into effect of city rent control law, plaintiff was not entitled to an injunction on ground that it would suffer irreparable injury merely because plaintiff would run risk of prosecution if plaintiff collected increased rentals allowed by Expediter's office, where if plaintiff increased rent for only one apartment for only one month, it could make a test case of the validity of the city rent law without subjecting itself to severe penalty. Teeval, Inc. v. City of New York, D.C.N.Y.1949, 92 F.Supp. 827.

155. Past offenses and acts

Action for injunction is so unrelated to punishment or reparations for past violations that its pendency or decision does not prevent concurrent or later remedy for past violations by indictment or action for damages by those injured. U. S. v. Oregon State Medical Soc., Or.1952, 72 S.Ct. 690, 343 U.S. 326, 96 L.Ed. 978.

An injunction may not be imposed on a defendant to punish for his past conduct, or be employed merely as a basis for jurisdiction which otherwise would not exist. Woods v. Wolfe, C.A.Pa.1950, 182 F.2d 516.

The remedy of an injunction is preventive and looks only to the future and it cannot be invoked for the purpose of punishment for wrongful acts already committed. Minneapolis & St. L. Ry. Co. v. Pacific Gamble Robinson Co., C.A. Minn.1950, 181 F.2d 812.

Granting of an injunction is not foreclosed because act feared has already happened if there is reasonable grounds for believing that it will be done again. Shore, for and on Behalf of N. L. R. B. v. Building & Const. Trades Council of Pittsburgh, Pa., C.A.Pa.1949, 173 F.2d 678, 8 A.L.R.2d 731.

Equity may act to avert an impending wrong and is not divested of power because defendant suspends his wrongdoing when he is sued, or protests his good intention for the future. Philadelphia Record Co. v. Manufacturing Photo-Engravers Ass'n of Philadelphia, C.C.A.Pa. 1946, 155 F.2d 799.

Where an injunction is sought to restrain a continuing injury and after suit is brought defendants claimed to have abandoned the course of conduct complained of, question for court is whether illegal conduct has been abated or whether menace to plaintiff's right still exists and if menace no longer exists injunction should be denied. Donnelly Garment Co. v. Dubinsky, C.C.A.Mo.1946, 154 F.2d 38. See, also, General Elec. Co. v. Gojack, D.C.Ind.1946, 68 F.Supp. 686.

An "injunction" is a relief granted to prevent future misconduct and does not issue to prevent a practice which has been definitely and permanently discontinued. Bowles v. Carnegie-Illinois Steel Corp., C.C.A.Ill.1945, 149 F.2d 545.

A court of equity need not award an injunction to prevent in future that which in good faith has been discontinued before commencement of suit, in absence of any evidence that offense will likely be repeated in future. Bowles v. Huff, C.C.A.Cal.1944, 146 F.2d 428. See, also, Bowles v. Cohen, D.C.Pa.1944, 65 F. Supp. 499.

The right to an injunction is not defeated by a defendant's discontinuance of

REF 26

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SECURITIES AND EXCHANGE COMMISSION Plaintiff -against- JAMES JOSEPH HAMMARTH Defendant	Case No. 74-1510 (T-3261) PAMPHLET OF STATUTES REFERENCED IN BRIEF